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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

RALPH DAVIS, individually, CHESTER BLAKEMORE, officially as the Director of the Department of Highway Safety and Motor Vehicles; and J. Eldredge Beach, individually and as Director of the Florida Highway Patrol, Department of Highway Safety and Motor Vehicles, Appellants,

v.

GREGORY SCOTT SCHERER, Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

JURISDICTIONAL STATEMENT AND APPENDIX

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QUESTIONS PRESENTED

1. Whether the provisions of Chapter 110, Florida Statutes (1981), which relate to post-termination hearings, and its implementing rules, are unconstitutional.

2. Whether the violation of state law abrogates the defense of good faith immunity when the conduct in question does not violate clearly established federal constitutional law.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The original Memorandum Opinion and Order of the United States District Court for the Northern District of Florida which appears in the appendix hereto, p. 1a, infra, is reported at 543 F.Supp. 4 (N.D. Fla. 1981). The Order Amending Judgment appears in the appendix hereto, p. 62a, infra.

The Rule 25 affirmance of the Court of Appeals for the Eleventh Circuit is reprinted in the appendix hereto, p. 83a, infra. The denial of Appellants' Petition for Panel Rehearing by the Court of Appeals for the Eleventh Circuit is reprinted in the appendix hereto, p. 85a, infra.

JURISDICTION

Appellants appeal the Rule 25 affirmance of the United States Court of Appeals for the Eleventh Circuit which was based on the opinion of the district court. Such opinion held Chapter 110, Florida Statutes (1981), and its implementing rules, unconstitutional in regard to post-termination procedures. It further held that Appellants were not entitled to the defense of good faith immunity.

Jurisdiction in the district court was predicated upon 42 U.S.C. §1983 and 28 U.S.C. §§1343 and 1331. Jurisdiction in the appellate court was predicated on 28 U.S.C. §1291.

The judgment of the Court of Appeals for the Eleventh Circuit was entered on June 30, 1983. A Petition for Panel Rehearing was entertained and denied on August 22, 1983. See p. 85a, infra.

A Notice of Appeal to this Court was duly filed in the Court of Appeals for the Eleventh Circuit on August 31, 1983. See p. 87a, infra.

This appeal is being docketed in this Court within 90 days from the denial of the Petition for Panel Rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2).

STATUTES AND REGULATIONS

Section 110.309, Florida Statutes (1981):

110.309 Procedure with respect to suspensions and dismissals.-

(1) A permanent employee in the State Career Service System who is suspended or dismissed by an agency or officer shall be entitled to a de novo fact-finding hearing. Such hearing shall be conducted by the commission itself, unless otherwise provided for by law.

(2) Upon a finding that just cause existed for the suspension or dismissal, the commission shall affirm the suspension or dismissal.

(3) Upon a finding that just cause did not exist for the suspension or dismissal, the commission may order the reinstatement of the employee, with or without back pay.

(4) Upon a finding that just cause for disciplinary action existed, but did not justify the severity of the action taken, the commission may, in its discretion:

(a) Reduce a dismissal to a suspension for such time as the commission may fix; or

(b) Reduce the period of a suspension.

(5) Any order of the commission issued pursuant to subsection (3) or subsection (4) shall be conclusive on the agency or officer concerned. The order may include an amount, to be determined by the commission and

paid by the agency, for reasonable attorney's fees, witness fees, and other out-of-pocket expenses incurred during the prosecution of an appeal against an agency in which the commission sustains the employee.

Section 22M-2.08, F.A.C.:

22M-2.08 Setting Appeal for Hearing.

(1) Either party may file a motion showing that discovery is complete and that an appeal is ready to be set for hearing. Upon the filing by either party of a motion to set an appeal for hearing, the appeal shall be set on the hearing docket within 30 days. The Commission shall hear all appeals as scheduled on the docket within a geographic area, as the Commission's travel schedule permits. The Commission reserves the right, within the group of hearings set for given dates, to hear cases out of docket order, to make the best use of its available hearing time.

(2) Time for appeal hearings shall be allotted to appeals according to the circumstances of each particular appeal.

(3) Unless otherwise stipulated by the parties, at least fourteen days' notice of the hearing shall be given.

(4) An appeal hearing may be held without the presence of the appealing party upon proof of notice of hearing having been properly

given to the appellant. A default shall not be entered in any appeal and the agency shall be required to present a prima facie case in support of the allegations upon which the agency action was taken.

(5) Except in instances where good cause is shown, motions for continuance must be filed not later than five calendar days after receipt of notice of the hearing, and shall be granted solely in the discretion of the Commission or its presiding officer. Motions for continuance will be granted only in cases of extreme emergency.

STATEMENT OF THE CASE

Appellee was employed in 1975 with the Florida Highway Patrol, a division of the Florida Department of Highway Safety and Motor Vehicles. In August, 1977, while an employee of the Florida Highway Patrol, Appellee took a second job as an auxiliary deputy with the Escambia County Sheriff's Office.

Due to Department regulations, it was incumbent upon Appellee to secure permission from his supervisors to hold secondary employment. Appellee sought approval which was initially erroneously granted and subsequently withdrawn due to the potential for conflict which might arise in working for two separate law enforcement agencies.

The reasons for the disallowance of Appellee's request for dual employment were explained to him orally and in

writing. However, Appellee continued to work as an auxiliary deputy, despite repeated requests that he resign his secondary position in accordance with Department rules. Appellee was ordered in writing to terminate his second job, but he refused to do so. By certified letter dated October 24, 1977, Appellee was terminated from his position with the Florida Highway Patrol due to his failure to comply with the dual employment policy.

As was his right, see p. 4, supra, Appellee appealed his dismissal to the Florida Career Service Commission. Prior to the scheduled Career Service hearing, Appellee settled his claim and received back pay, reinstatement and other benefits. Appellee was reinstated to his former position with the Florida Highway Patrol. Appellee then volun-

tarily resigned his position with the Florida Highway Patrol.

Appellee filed suit in the District Court for the Northern District of Florida alleging a denial of procedural due process and a denial of the First and Ninth Amendment right to privacy. Appellee specifically raised the question of the constitutionality of section 110.061, Florida Statutes (1977) (the statute in effect at the time), and its implementing rules and regulations, in his Amended Complaint. As one of their defenses in answer to Appellee's Amended Complaint, Appellants raised the defense of good faith immunity, asserting that all their actions had been taken in good faith.

After a bench trial, the district judge entered a Memorandum Opinion and Order, p. 1a, infra, which held, in

pertinent part, that section 110.061, Florida Statutes (1977), was unconstitutional because it did not provide pre-termination procedures, a prompt post-termination hearing and back pay to a prevailing employee. The district judge further found that the Appellees were not entitled to a claim of good faith immunity because the law on pre-termination due process was settled at the time of their actions.

Subsequently, the Florida Legislature repealed section 110.061, Florida Statutes (1977). The district court then entered an Order Amending Judgment, p. 62a, infra. This Order vacated the portion of the previous order declaring section 110.061, Florida Statutes (1977), and its rules and regulations unconstitutional, and replaced it with a holding that the 1981 revision of

Chapter 110, Florida Statutes, and its implementing rules, were unconstitutional insofar as they failed to provide a prompt post-termination hearing. The Order Amending Judgment also recognized that the law as to pre-termination due process was not clearly established at the time in question and vacated that portion of the prior order. However, the district court held that since Appellants had violated certain regulations of their own agency, this deprived them of qualified immunity.

Appellants appealed the district court's ruling, both on the constitutionality of Chapter 110, Florida Statutes (1981), and its implementing rules, and the issue of good faith immunity, to the Court of Appeals for the Eleventh Circuit. The Court of Appeals issued a Rule 25

affirmance, without explanation, based on the order of the district judge. Appellants filed a Petition for Panel Rehearing which was denied.

THE QUESTIONS ARE SUBSTANTIAL

The two issues raised in this appeal are questions of the utmost importance to the State of Florida. They involve the procedure which the State must utilize in terminating employees from state employment and the standard by which Florida officials' future conduct will be judged. Both these issues were erroneously decided in light of clearly established federal constitutional precedent to the contrary and deserve this Court's attention.

1. Constitutionality of Chapter 110, Florida Statutes (1981).

The district court declared Chapter 110, Florida Statutes (1981), unconstitutional in regard to post-termination procedures. However, it is clear that such a question should never have been reached because the court had no justiciable issue before it.

Federal constitutional law is clear that for declaratory relief to be appropriate, a live dispute must be present. Golden v. Zwickler, 394 U.S. 103 (1969). In the case of a statute's constitutionality, the statute in question must have been in effect at the time in controversy and must have been applied to the complaining party. In the instant case, the statute which the district court found unconstitutional, Chapter 110, Florida Statutes (1981), had not even been promulgated, let alone applied, at the time of Appellee's termination in 1977. Thus, no live dispute as to the statute's constitutionality existed, and this issue was not justiciable.

Further, and closely related to the requirement of a live controversy, is the necessity that a litigant have a

personal stake in the resolution of an issue in order to invoke the power of a federal court to issue a declaratory judgment. O'Shea v. Littleton, 414 U.S. 488 (1974). If a litigant lacks this requisite personal interest, the issue becomes moot and is not appropriate for declaratory relief. Murphy v. Hunt, 455 U.S. 478 (1982), quoting, United States Parole Commission v. Geraghty, 445 U.S. 388 (1980). "[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. North Carolina v. Rice, 404 U.S. 244, 246 (1971) (citation omitted). See also, Murphy v. Hunt; Mazaleski v. Harris, 481 F.Supp. 696 (S.D. D.C. 1979).

Appellee voluntarily left state employment in January 1979. Since that time he could not possibly have been

subject to the termination provisions of the Florida Career Service Commission as set forth in Chapter 110. Appellee's rights could in no way be affected by a declaration as to Chapter 110's constitutionality, and he therefore lacked the necessary personal stake in the outcome of the litigation needed to invoke the jurisdiction of the federal court. Thus, the district court should never have ruled on the statute's constitutionality.

A further, and equally well-established, principle of federal constitutional law is that when faced with a constitutional challenge to a statute, a court must interpret a statute so as to render it constitutional, if at all possible. Balsecki v. City of Durham, North Carolina, 456 F.2d 87 (4th Cir. 1972), cert. den., 409 U.S.

912 (1973); In re Evans, 452 F.2d 1239 (D.C. Cir. 1971), cert. den., 408 U.S. 930 (1971). Every effort must be made to save the constitutionality of a statute where at all possible.

In the present case, it is absolutely clear that the statute in question is constitutional on its face and capable of constitutional interpretation. See, Davis v. Williams, 617 F.2d 1100 (5th Cir. 1980), cert. den., 449 U.S. 937 (1981). This is not a case where the statute contains an affirmatively unconstitutional provision.

While the statute does not on its face state a time within during which a post-termination hearing must be held, the district court should have interpreted the statute to provide a hearing within whatever time frame is

constitutionally mandated. See, Caswell v. Califano, 538 F.2d 9 (1st Cir. 1978); Jordan v. United Insurance Co. of America, 289 F.2d 778 (D.C. Col. 1961); Cornelius v. Minter, 395 F.Supp. 616 (D.C. Mass. 1974). The district court ignored these stellar principles of statutory interpretation by striking a statute fully capable of constitutional interpretation.

Further, the statute in effect at the time of Appellee's termination, §110.061, Florida Statutes (1977), was constitutionally applied to Appellee. While nine months did elapse between Appellee's appeal and the time such appeal was set for hearing, this was not such a long delay as to render the statute constitutionally infirm. See, Ciechon v. City of Chicago, 634 F.2d 1055 (7th Cir. 1980); Thomson v. Bass,

616 F.2d 1259 (5th Cir. 1980), cert. den., 449 U.S. 983 (1980); Alsbury v. United States Post Office, 530 F.2d 852 (9th Cir. 1976), cert. den., 429 U.S. 828 (1977); Blackford v. Maryland Automobile Insurance Fund, 532 F.Supp. 24 (D. Md. 1981).

Appellee's situation was certainly different from that of the plaintiff in Barry v. Barchi, 443 U.S. 55 (1979), the only case cited by the district court in support of its holding striking the statute. In Barry, a suspension of fifteen days was in question. Because of the brief duration of the suspension, no hearing could be held until the full penalty had run and plaintiff, a horse trainer, had lost his clients. That is to be contrasted with Appellee's situation. Upon prevailing at the Career Service Commission, Appellee would have

been entitled to back pay and reinstatement. Appellee could have been made whole as contrasted with the plaintiff in Barry.

Finally, the district court's ruling gave absolutely no guidance or direction to the State of Florida in regard to what would be a constitutionally acceptable time-frame for the holding of a post-termination hearing. Rather, the ruling left Florida's Career Service Commission in a state of confusion. At the least, state officials deserve to know what is constitutionally permissible when a state statute is stricken.

2. Good Faith Immunity.

In Harlow v. Fitzgerald, ___ U.S. ___, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), this Court explicitly interpreted and explained the application of the good faith immunity defense. Prior

to Harlow, the immunity defense had a subjective and an objective prong. However, in Harlow, this Court eliminated the subjective prong of the defense as unworkable due to the disruptive effect on government of judicial inquiry into subjective motivation.

This Court announced in Harlow that henceforth the test for determining the applicability of good faith immunity would be the objective test as set out in Wood v. Strickland, 420 U.S. 308 (1975):

> [T]he judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Harlow, ___

U.S. ___, 102 S.Ct. 2727, 73 L.Ed.2d at 410-411 (emphasis added).

The district court specifically found that at the time of the conduct in question here, there was no clearly established constitutional law that such conduct violated Appellee's rights. See, p. 67a, infra. Under Wood and Harlow, this should have ended any inquiry into the good faith immunity defense, and judgment on the damages claim should have been entered in Appellant's favor.

It was clearly inconsistent with Harlow for the district court to find that a violation of agency regulation as opposed to federal constitutional law, meant that Appellants did not meet the test for objective good faith immunity. In doing so, the district court relied on this Court's initial announcement of the good faith immunity test in Scheuer v. Rhodes,

416 U.S. 232 (1974), and found that the test for good faith immunity was a general test of "reasonableness." The district court further found that violating agency regulation could not be reasonable and thus the good faith immunity defense was inapplicable.

However, this reasoning is clearly contrary to this Court's latest pronouncment on the good faith immunity question in Harlow. This Court was explicit in Harlow, and cases subsequent to Scheuer, such as Butz v. Economou, 438 U.S. 478 (1978), Procunier v. Navarette, 434 U.S. 555 (1977), and Wood v. Strickland, 420 U.S. 308 (1975), in detailing the appropriate objective test for good faith immunity. That test states that objective good faith immunity is abrogated only if "the constitutional right allegedly infringed . . . was clearly established at

the time of their challenged conduct" and "they knew or should have known of that right" and "they knew or should have known that their conduct violated the constitutional norm." Procunier v. Navarette, 434 U.S. at 562.

The good faith immunity cases subsequent to Scheuer have stated the objective good faith immunity test solely in terms of whether the constitutional law was clearly established at the time of the conduct in question. See, Crowder v. Lash, 687 F.2d 996 (7th Cir. 1982); Clanton v. Orleans Parish School Board, 649 F.2d 1084 (5th Cir. 1981); Jihaad v. O'Brien, 645 F.2d 556 (6th Cir. 1981); Jackson v. State of Mississippi, 644 F.2d 1142 (5th Cir. 1981). To consider agency regulations or state law, is to contavene those decisions.

Further, to require state officials to have followed the letter of all state

statutes, rules and regulations before the good faith immunity defense is applicable does not foster "the public interest in deterrence of unlawful conduct." Harlow, ___ U.S. ___, 102 S.Ct. 2727, 73 L.Ed.2d at 411. It will simply cause state officials to operate with the fear that, even though a citizen has no clearly established constitutional right, if state statutes or regulations are not followed, and those statutes or regulations are later determined by federal court to have foreshadowed, perhaps several years hence, subsequently developed constitutional law, the officials will be liable for damages. This flies directly in the face of the Supreme Court's statement in Procunier that officials "cannot be expected to predict the future course of constitutional law." 434 U.S. at 562.

Moreover, to decide the good faith immunity defense by reference to state regulations or law punishes those state agencies which have adopted administrative procedures going beyond the requirements of federal constitutional law. If prophylactic procedures are adopted and later found to be constitutionally required, agency officials will be liable in damages for failure to follow their own procedures. The end result is that the agency which is trying harder to provide protective procedures is punished. Thus, a state agency now may well decide that it will not provide any procedures for the protection of employees, prisoners, students or the general public unless required by clearly established federal constitutional law. If no procedures are adopted, state officials cannot be held liable for damages even if, in the future, a federal court decides

those procedures are constitutionally mandated.

The district court's decision that qualified good faith immunity was not available to Appellants because they did not follow an agency regulation contravenes Supreme Court cases establishing that "an official [will] not be held liable in damages under §1983 unless the constitutional right he was alleged to have violated was 'clearly established' at the time of the violation." Butz v. Economou, 438 U.S. at 498. Even if the law were not so clear, there are compelling policy reasons why reference to agency regulations or state law in deciding the good faith immunity issue is unnecessary and unwarranted.

Thus, the district court has inappropriately applied the test for good faith immunity. To allow its decision to stand

will recreate the confusion which this Court sought to allay in Harlow.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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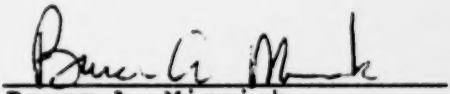
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Statement has been furnished by United States Mail to BEN R. PATTERSON, Counsel for Appellee, 1215 Thomasville Road, Post Office Box 4289, Tallahassee, Florida 32303, this 21st day of September, 1983.



Bruce A. Minnick

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IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GREGORY SCOTT SCHERER,

Plaintiff,

v. TCA 79-0885

RALPH DAVIS, individually;
CHESTER BLAKEMORE, officially
as Director of the Department
of Highway Safety and Motor
Vehicles; and J. ELDREDGE BEACH,
individually and as Director of
the Florida Highway Patrol, De-
partment of Highway Safety and
Motor Vehicles,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff Gregory Scott Scherer brought this complaint pursuant to the Fifth, Ninth, and Fourteenth Amendments to the United States Constitution and 42 USC §1983. Declaratory and injunctive relief are sought pursuant to 28 USC §§1651, 2201, and 2202. The court has jurisdiction under

28 USC §§1343 and 1331. Scherer seeks monetery damages, as well as injunctive and declaratory relief, for the defendants' failure to provide him with either pre-termination or post-termination due process; he also seeks a declaration that Section 110.061, Florida Statutes and its implementing rules and regulations are unconstitutional because violative of due process in their failure to safeguard an employee's rights prior to termination, to guarantee back pay or reinstatement for wrongful termination, and failure to provide expeditious post-termination hearing and decision.

On April 6, 1981, this case was tried before the court without a jury. Fed.R.Civ.P. 39(b). In accordance with Federal Rule of Civil Procedure 52(a), the court makes the following findings of fact relevant to the disposition of this case.

Findings of Fact

Gregory Scott Scherer was an employee of the State of Florida Department of Highway Safety and Motor Vehicles, Division of Florida Highway Patrol, Troop A, employed as of January 13, 1975, holding the position of a Radio-teletype Operator in Pensacola, Florida. Plaintiff Scherer had attained permanent status within the Career Service System of the State of Florida and had been consistently rated a satisfactory employee. His gross pay as of October 25, 1977, on a monthly basis, was seven hundred fifty-three dollars and thirty-three cents ($753.33).

During the months of September and October of 1977, the Executive Director of the Department of Highway Safety and Motor Vehicles was Ralph Davis. Davis continued as Executive Director of the agency until September 30, 1978, when he was succeeded

by Chester Blakemore. The Director of the Florida Highway Patrol (FHP) in 1977 and continuing to the present was and is Colonel Eldredge Beach. The policy of the Department of Highway Safety and Motor Vehicles required Beach and Davis to approve each and every suspension or dismissal of an employee of the FHP, including the dismissal of Scherer. Beach and Davis approved the plaintiff's dismissal from his employment effective October 25, 1977.

On September 9, 1975, the Department of Highway Safety and Motor Vehicles had adopted a policy on the subject of dual employment and compensation, Policy Number 009. The policy was signed by Ralph Davis. The purpose of the policy was to require approval of outside employment in order to avoid a conflict of interest. Pursuant to the requirements of that

policy, on August 26, 1977 Scherer requested that his troop commander, Captain K. S. Sconiers, approve Scherer's outside employment as an Escambia County Sheriff's Reserve Deputy. Sconiers told the plaintiff he doubted that approval would be granted, but by memorandum dated September 1, 1977, Captain Sconiers notified the plaintiff that he had permission to accept parttime employment as an Escambia County Sheriff's Reserve Deputy. The memorandum further stated that such permission would be rescinded "[S]hould this employment interfere in any way with your duties with this department." Sconiers claims his secretary was supposed to hold the September 1 letter until he had "checked with Tallahassee."

Relying on the letter of approval, Scherer purchased a uniform and a pistol and was employed parttime as an Escambia

County Sheriff's Reserve Deputy assigned with other such officers to guard the set for the movie "Jaws II." By memorandum dated September 23, 1977, Capt. Sconiers informed the plaintiff that ". . . the department feels that it would be of the best interest to our department for you not to accept this employment; therefore, your request . . . is denied at this time."

On October 3, 1977, Sgt. W. A. Clark informed Lt. C. C. Wiggins that plaintiff was continuing to work as a reserve deputy and recommended Scherer's termination from the FHP. On October 4, 1977, Lt. Wiggins informed Capt. Sconiers of plaintiff's continuance to work as a reserve deputy and recommended Scherer's suspension or dismissal. On October 7, 1977, Sgt. Clark informed Capt. Sconiers that he had advised Scherer he was violating instructions and Scherer had responded that he had invested

too much money in uniforms to give up his parttime work.

Sconiers then wrote to Col. J. E. Beach on October 12, 1977, attaching plaintiff's letter of request, the captain's own letters approving the request and rescinding the approval, Sgt. Clark's and Lt. Wiggins's memos, and recommending that plaintiff Scherer be suspended for three days for violation of the department's dual employment policy. On October 18, 1977, Lt. Wiggins ordered Scherer to terminate his employment as a reserve deputy and on the same date Scherer wrote to Capt. Sconiers explaining that he felt there was no reason for him to resign his outside employment because it did not interfere with his work as a radio operator for the FHP. Wiggins also wrote to Sconiers on that date saying Wiggins and Clark had spoken with Scherer and Scherer was unable

to see any interference in his FHP duties which was caused by his reserve deputy duties. Sconiers testified at trial that Major A. P. Floyd, Deputy Inspector of the FHP, had caused him to not approve Scherer's outside employment because Floyd thought that the possibility of Scherer being supoenaed in connection with his reserve deputy duties might conflict with his duties as a radio operator at the FHP.[1] No one ever identified the conflict to plaintiff; Wiggins testified he didn't know what the conflict was. Wiggins and Clark evidently asked the plaintiff only what his intentions were concerning his outside employment. On October 18, 1977, Sconiers forwarded to Beach the two letters of that date from Wiggins and Scherer's letter of that date, but mistakenly dated August 18, 1977.

By certified letter dated October 24, 1977 and received by plaintiff on October 25, 1977, Scherer was terminated from his FHP employment effective October 20, 1977. At no time prior to the letter of termination was the plaintiff given notice in writing of a proposed discharge or an opportunity to respond verbally or in writing to the official charged with making the termination decision, the defendant Beach. At no time prior to October 25, 1977, was the plaintiff notified of any right that he might have to respond to Col. Beach's letter of dismissal. There is no evidence of any affidavit or statement given or made to Beach or Davis which showed or purported to show that the plaintiff's outside employment conflicted in any manner with his duties as a radio-teletype operator for the Florida Department of Highway Safety and Motor Vehicles,

Division of Florida Highway Patrol, although the conflict has purportedly been identified by Beach's staff. In addition, the choice to dismiss rather than suspend Scherer, is in violation of the department's own disciplinary guidelines.

On November 10, 1977, the plaintiff, pursuant to the Florida statutory scheme providing for a hearing on dismissal for Career Service Employees, filed an appeal against his dismissal with the Florida Career Service Commission, claiming he had been dismissed without just cause because his dismissal was pursuant to a rule not validly adopted by the department. On November 18, 1977, the plaintiff was notified by Dorothy B. Roberts, Appeals Coordinator, that his appeal had been received and that the Department of Highway Safety and Motor Vehicles had been requested to provide certain information

relative to his employment status to enable the Career Service Commission to determine the plaintiff's appeal rights. By letter dated December 8, 1977, signed by Miles R. Dean, from Conley M. Kennison, State Personnel Director, Mr. Scherer was notified that his appeal was in order and would be heard by the Career Service Commission. Scherer's attorneys did not request an expedited hearing.

On or about April 19, 1978, and pursuant to the Administrative Procedures Act, the plaintiff filed a petition for a rule challenge to Policy Number 009 of the Department. On June 28, 1978, the challenged Policy Number 009 on the subject of dual employment and compensation was declared invalid. The Department of Highway Safety and Motor Vehicles did not appeal the invalidation of Policy Number 009 to the District Court of Appeal, and

the determination that the Policy Number 009 as applied to plaintiff was an invalid rule became final on July 28, 1978.

By letter dated July 13, 1978, signed by Dorothy B. Roberts, Appeals Coordinator for the Career Service Commission, the plaintiff was notified that his appeal against dismissal would be heard by the Career Service Commission on August 4, 1978. On July 24, 1978, the Department of Highway Safety and Motor Vehicles gave notice to the plaintiff of additional reasons for the plaintiff's dismissal of October 25, 1977.

Section 110.061, Florida Statutes provides that the Career Service Commisson may, "in its discretion," order reinstatement for termination of a career service employee "without just cause" without awarding back pay. The Career Service Commission is given ninety days from the

date of hearing an appeal within which to issue its written order, either upholding an agency's action or reinstating an employee determined to have been unjustly discharged. §120.59, F.S. If a state agency appeals an adverse decision of the commission, the commission's order to reinstate is stayed, by operation of the Florida Rules of Appellate Procedure, until after the District Court of Appeal has disposed of the agency's appeal. See §120.68, F.S.; Rule 9.310(b)(2), Fla.R.App.P.

On August 10, 1978, the Career Service Commission entered its order approving a stipulation and agreement between the Department of Highway Safety and Motor Vehicles and the plaintiff, by which plaintiff's dismissal was withdrawn and plaintiff was credited with his sick and annual leave as if no dismissal had

occurred, was awarded three thousand four hundred fifty dollars (3,450.00) for back wages, and was reinstated to his position of employment effective August 4, 1978. Had Scherer continued as a Radio-teletype Operator with the Department of Highway Safety and Motor Vehicles from October 25, 1977 to August 4, 1978, he would have earned six thousand eight hundred sixteen dollars and fifty-one cents ($6,816.51) from such employment.

Following his dismissal on October 25, 1977, the plaintiff worked odd jobs as an auxiliary deputy. He couldn't meet his bills and was forced to borrow money from his parents and in-laws. He owed money to loan companies and banks and had certain personal property repossessed. Scherer's physical and mental health deteriorated. He lost weight; smoked and drank heavily; slept restlessly, if at all; avoided his

friends; and was humiliated and embarrased [sic] by his financial situation and his dealings with creditors. The plaintiff's worst mental depression was in the first six months following the discharge, but he is still troubled by the problems it initiated. Scherer and his wife filed a petition in bankruptcy on December 6, 1979, of which this court takes judicial notice, and were adjudged bankrupt in 1980. They have been unable to get credit since that adjudication and both testified as to their inability to purchase a home.

Plaintiff Scherer reported back to work to the Chief of Radio-teletype Operations, W. A. Hagerty, in Pensacola on August 4, 1978, the same day as his Career Service hearing in Tallahassee. On August 7, 1978, Chief Hagerty called plaintiff from his work area and accompanied him to Sgt. Clark's office. Clark inquired as to

Scherer's intentions with the FHP and Scherer informed him that he was planning to apply for a trooper's position. Clark adivsed Scherer that he would not recommend the plaintiff for a trooper's position because in his opinion Scherer would not make a good trooper, having failed to obey an order and having won his appeal only because of a "technicality."

On August 18, 1978, plaintiff requested that Chief Hagerty allow him to take a week of annual leave. At the time of the request, Chief Hagerty said he would approve plaintiff's leave, but when plaintiff checked twelve days later to see if his request had been given official approval, Hagerty said he would have to check with Sgt. Clark. Later that day, Hagerty informed Scherer that Sgt. Clark and Lt. Wiggins had no written proof that Scherer had annual leave accumulated.

Plaintiff requested they call the departmental personnel office in Tallahassee to verify his leave and Hagerty said verification would have to be written. Plaintiff himself phoned personnel, requesting that the director contact Capt. Sconiers regarding his accumulated leave. A short while later he got a call from Hagerty advising his leave had been approved.

On September 1, 1978, Chief Hagerty informed plaintiff that his shift had been changed so that another operator could be given Saturdays and Sundays off. This resulted in Scherer having to rotate to the 11:00 p.m. to 7:00 a.m. shift more frequently than he would ordinarily. The midnight shift was considered onerous duty.

On September 11, 1978, plaintiff became ill while on duty and notified his corporal who came about an hour later and took

Scherer to the hospital. Two days later, while Scherer was recovering from the bout with kidney stones, Chief Hagerty came to the hospital with a State of Florida employment application for Scherer to fill out. Scherer refused to do so from memory and responded that it would have to wait until he could obtain a copy of his original application, which was on file in Tallahassee, to make sure that the second application was completed accurately. Plaintiff reported these incidents of August 7, August 30, September 1 and September 13 to Capt. Sconiers by letters, copies of which were also sent to Lt. Wiggins and Col. Beach, requesting that Clark and Hagerty be disciplined for harassment. Plaintiff testified that there were additional incidents continuing up to January 11, 1979, but that he got tired of writing letters to no avail.

Capt. Sconiers explained the incidents of leave time and the application as caused by the necessity to update Troop A's records following Scherer's reinstatement. As soon as plaintiff's leave was verified, his request was granted; the employment application was thought to be necessary to get Scherer back on the payroll. However, Clerk [sic] and Hagerty were apparently less than cooperative to Scherer in getting these "housekeeping" measures accomplished.

There is no evidence of any immediate response on the part of Col. Beach to plaintiff's letters charging harassment. Capt. Sconiers, however, advised Sgt. Clark that he had been wrong to talk to Scherer as he had about Scherer's aspirations to be a tropper and Lt. Wiggins told Sgt. Clark much the same thing. Lt. Wiggins also advised Chief Hagerty that he shouldn't

change one operator's shift to accomodate another; that both should agree to any change. Lt. Wiggins advised both Hagerty and Clerk [sic] to forget the past and leave the plaintiff alone, but Clark admitted he was of the "old school" and thought one should follow instructions without question. Wiggins and C. P. Anthony, the chief dispatcher, both testified that Hagerty and the plaintiff had a personality conflict. Although there is no evidence that an order to "hard time" plaintiff came down the chain of command, Clark and Hagerty apparently did exactly that.

In January of 1979, plaintiff and Chief Dispatcher Anthony were working on the 3:00 p.m. to 11:00 p.m. shift when they began to have low band problems. Both men were aware that FCC regulations require that only a qualified engineer repair the radio

equipment. Anthony testified that Scherer went to the transmitter room with a fuse and soon the transmitter was working again, although the radio was still not functioning on the receiving side. Sconiers thought either Anthony or Clark advised him that Scherer replaced the fuse and Sconiers sent the information to Tallahassee. Scherer insists the licensed engineer told him to replace the fuse to save the engineer from having to make a trip to Pensacola from Panama City to do so.

Major John Hicks, a deputy inspector in 1979, was sent to Pensacola on January 10 to investigate the trouble with the radio equipment. Hicks sent word to Wiggins and Sconiers that he wanted to meet with the plaintiff. Scherer was told near the end of his shift at 7:00 a.m., to stay for two hours to meet with Major Pitts [sic]. The plaintiff left at the end of his shift to

take his pregnant wife to her doctor's appointment. Scherer left word that "the Major could shove it." When Major Hicks got to Pensacola and was advised the plaintiff was not waiting to meet with him, he reported this to Col. Beach and a teletype was sent suspending the plaintiff pending "completion of investigation."

By memorandum dated January 11, 1979, the plaintiff informed defendant Beach that he wished to resign his position with the Highway Patrol effective January 13, 1979. By memorandum dated January 12, 1979, defendant Beach advised plaintiff Scherer that Scherer was relieved of duty January 10, 1979, pending an investigation; however, in view of plaintiff's letter of January 11, 1979, his resignation was accepted effective January 13, 1979. The plaintiff's last day on the payroll of the Department of Highway Safety and Motor

Vehicles was January 13, 1979. As of the date Scherer was making seven hundred seventy-two dollars ($772) monthly. The plaintiff received all his accrued leave and did not attempt to take an appeal from the second termination of his FHP emplomentto the Career Service Commission. Scherer asserts he resigned in order to avoid further harassment and to remove a cloud over his employability so that he would be able to accept employment which he had already been offered at the Escambia County Sheriff's Office.

Conclusions of Law

A. The effect of the Career Service Commission Settlement.

Initially, this court must consider the effect of the plaintiff's settlement of his Career Service Commission proceeding against the Department of Highway Safety

and Motor Vehicles for the official acts of its agents who are individually sued herein. The defendants contend that by entering the settlement with the department, which was subsequently approved by the commission, and by accepting partial back pay and reinstatement, as well as partial payment of his attorneys' fees, the plaintiff waived his right to relief under 42 USC §1983. For such contention, defendants rely on Strozier v. General Motors Corp., 442 F.Supp. 475 at 481 (N.D. Ga. 1977) which in turn relies on the pronouncement of the Fifth Circuit United States Court of Appeals against employee windfalls in United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975), cert. denied, 425 U.S. 944, 48 L.Ed.2d 187 (1976). In view of Scherer's admitted knowing and voluntary settlement of his CSC action, the apparent general

philosophy of this circuit expressed en banc in Patsy v. Florida International University, 634 F.2d 900 (5th Cir. 1981), and the above-cited interpretaiton of Footnote 15 of Alexander v. Gardner-Denver Company, 415 U.S. 36, 39 L.Ed.2d 147 at 160 (1974), defendants' argument for waiver of plaintiff's statutory rights in this instance is initially persuasive.

In the absence of a settlement containing express waiver of Scherer's §1983 claims, however, this court finds its decision on this issue to be controlled by the Fifth Circuit's latest and most specific treatment of the settlement issue in Strozier v. General Motors Corp., 635 F.2d 424 at 426-7 (5th Cir. 1981). In affirming the district court's finding of waiver in Strozier, the Fifth Circuit reiterated its earlier pronouncement:

> In no respect does . . . Gardner-Denver support the assertion that an

> aggrieved employee who freely settles his or her unliquidated demand with the employer or the union may reciprocate by suing the same defendant at a later date on the same cause of action, merely because the employee grows dissatisfied with the payment for which he or she settled.

United States v. Allegheny-Ludlum Industries, Inc., supra at 858.

The court then proceeded to base its affirmance on the fact that Strozier had accepted settlement of a grievance action in which the remedy sought and settled was the precise remedy sought in the later lawsuit, which was held to be barred with respect to such claims. Strozier v. Gen. Motors Corp., supra at 426-7. Unlike Strozier, plaintiff Scherer has specifically pled for additional specialized relief in this action which could not have been afforded in the Career Service Commission proceeding, i.e. declaratory relief, additional compensatory damages, and exemplary damages.

The Fifth Circuit's Strozier opinion thus controls this court's holding that the claim plaintiff Scherer has herein asserted for unrecovered wages lost by his termination of October 20, 1977 and subsequent unemployment until August 4, 1978 and any claim for injunctive relief for any violations of due process attendant to that termination have been fatally compromised by his acceptance of partial back pay and reinstatement in the CSC settlement.[2] Plaintiff's claims for compensatory damages not recoverable in a Career Service Commission proceeding, his claims for exemplary damages, and his claim for declaratory relief have not been waived.

B. Section 110.061, Florida Statutes, and Due Process.

As a permanent career service employee of the State of Florida, Scherer had a recognized property interest in his employment. §110.061, F.S.; Op. Att. Gen. 075-94; Prince v. Lewis, TCA 75-149 (N.D. Fla. December 28, 1978); Board of Regents v. Roth, 408 U.S. 593 (1972). His dismissal from such employment was a deprivation of that property interest. Scherer's dismissal by defendants Davis and Beach constituted state action for which legitimate governmental concern was asserted. Thus, the four essential elements which must be met for the Due Process Clause of the Fourteenth Amendment to apply are present in this case. See Craig v. Carson, 449 F.Supp. 385, 390 (M.D. Fla. 1978).

Because the scope of those rights redressable under 42 USC §1983 is identical to the "centerpiece" of constitutional rights guaranteed by the Fourteenth Amendment, the necessary elements for a §1983 claim, (1) conduct by a defendant under the authority of state law and (2) deprivation of a plaintiff's constitutional rights by that conduct, have also been established herein if Scherer's due process rights were violated. Mitchum v. Foster, 407 U.S. 225, 238-9 (1972); Monroe v. Pape, 365 U.S. 167, 171 (1961); Morgan v. Odom, 552 F.2d 147, 148 (5th Cir. 1977); Sullivan v. Brown, 544 F.2d 279, 284 (6th Cir. 1976).

In determining whether the procedures afforded plaintiff comported with the dictates of the Fourteenth Amendment, this court recognizes that the United States Supreme Court has consistently held that an

individual is entitled to some sort of procedural protection before being deprived of a property interest. Mathews v. Eldridge, 424 U.S 319 (1976); Board of Regents v. Roth, supra. The concept of due process is a flexible one. Morrisey v. Brewer, 408 U.S. 471 (1972); Hannan v. Larche, 363 U.S. 420 (1960); Hicks v. Dobbs, 612 F.2d 577 (5th Cir. 1980).

The fundamental requirement of due process is "the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914). The purpose of this requirement is not only to ensure the abstract concept of fair play, but also to prevent the arbitrary deprivation of property rights. Fuentes v. Shevin, 407 U.S. 67 (1972). The opportunity to be heard should be granted at a meaningful time and in a manner which is appropriate to the nature of the situation. Armstrong v. Manzo, 380 U.S.

306 (1950). It "must be tailored to the capacities and circumstances of those who are to be heard." Goldberg v. Kelly, 397 U.S. 254, 268-9 (1970).

Determination of whether due process requires an evidentiary hearing prior to the deprivation of a property interest requires analysis of such factors as (1) the nature of the private interest affected; (2) the risk of an erroneous deprivation of a property interest; (3) the probable value of substitute or additional procedural safeguards; and (4) the governmental interest that substitute or additional procedures would affect. Mathews v. Eldridge, supra; Dixon v. Love, 431 U.S. 105 (1977).

The formula in Mathews calls for a balancing of the government's interest in the maintenance of an employee's efficiency and discipline against the plaintiff's

interest in keeping his public employment pending an evidentiary hearing. In Arnett v. Kennedy, 416 U.S. 134 (1974), a majority of the justices found that (1) a federal statute guaranteeing continued employment absent cause for discharge confers a legitimate claim of entitlement constituting a property right under the Fifth Amendment; (2) for an employee to be deprived of a protected property interest in continued employment, an evidentiary trial-type hearing is necessary at some stage of the proceeding; and (3) a pre-termination hearing is not required for non-probationary employees in the competitive civil service, since the Lloyd-LaFollette Act, 5 USC §7501, provides other procedureal safeguards in lieu of a pre-dismissal evidentiary hearing, which safeguards represent a reasonable accommodation of competing interests.

Section 110.061, Florida Statutes (1977) contains no requirement of a pretermination hearing and none was provided Scherer. Of course, Thurston v. Dekle, 531 F.2d 1264, 1272 (5th Cir. 1976), vacated on other grounds 438 U.S. 901 (1978), on remand 578 F.2d 1167 (1978) makes it clear that a full evidentiary hearing prior to employment termination is not required. The balance which is struck must minimize the risk of wrongful termination while not requiring elaborate pretermination proceedings which wuold burden the governmental function. See Board of Regents v. Roth, supra at 579 n.7. However, it is not constitutionally sufficient to grant a due process hearing following termination with nothing more. The law requires that

> Where a governmental employer chooses to postpone the opportunity of a non-probationary employee to

> secure a full-evidentiary hearing until after dismissal, risk reducing procedures must be accorded. These must include, prior to termination, written notice of the reason for termination and an effective opportunity to rebut those reasons. Effective rebuttal must give the employee the right to respond in writing to the charges made and to respond orally before the official charged with the responsibility of making the termination decision (footnotes omitted).

Thurston v. Dekle, 531 F.2d at 1273. When a state's interest justifies action after only summary informal proceedings, the full post-termination hearing "must be available promptly after the temporary deprivation occurs." (Emphasis in original; citations omitted.) Barry v. Barchi, 443 U.S. 55, 51 L.Ed.2d 365, 380 (1979).

Section 110.061, Florida Statutes (1977) and its contemporary implementing rules do not require written notice of the reasons for termination, nor is any provi-

sion made for the effective confrontation of the termination decision maker prior to termination. Indeed, the pretermination protections provided by the statute and rules fall far short of those found inadequate in Thurston. See Glenn v. Newman, 614 F.2d 467, 472 (1980). Further, the post-termination hearing process does not assure the requisite promptness.

With respect to Scherer's termination the procedures followed by defendants Beach and Davis were inadequate. The plaintiff did not have an effective opportunity to rebut the claim of conflict between his outside employment and his duties for the FHP or to dispute prior to the termination decision whether the pursuance of dual employment constituted cause for dismissal. Scherer was given written notice of dismissal along with notice of the stated reason. No effective

opportunity to present oral or written argument to Ralph Davis or Col. Beach, the ultimate decision maker, was ever provided. Plaintiff was not offered the prompt hearing and prompt disposition of his appeal from the termination decision which is mandated by Barry v. Barchi and prior cases. His attorneys' failure to move the commission for an expedited hearing, even had they known of the possibility of such scheduling relief, does not mitigate the fact that the statutorily-created appeal process is not sufficiently prompt to provide adeuquate due process.[3]

Section 110.061, Florida Statutes (1977) has been previously held to be constitutionally deficient because it provides that the commission may order reinstatement for wrongful termination without awarding back pay, a decision which would itself amount to a due process

violation. See Casines v. Murchek, et al., TCA 78-820, p. 8 (N.D. Fla. January 13, 1981).

Based on his October 24, 1977 termination, plaintiff is entitled to a declaration that Section 110.061, Florida Statutes (1977) and its implementing rules are unconstitutional insofar as (1) they fail to mandate pre-termination procedures which safeguard the rights of employees, (2) they fail to provide a prompt post-termination hearing and (3) they fail to guarantee back pay to an employee determined to have been dismissed without just cause.

Plaintiff's suspension on January 10, 1979, pending "completion of an investigation" into destruction of state property was accomplished by means of admittedly minimal written notice, i.e. Col. Beach's teletyped message. Considering all of the

circumstances, such suspension did not offend due process requirements, due process being a flexible concept. (See discussion, supra at 14-16). Scherer's refusal to cooperate with the investigation and his January 11, 1979 voluntary and knowing resignation from his FHP employment caused the department to abandon the investigation and any subsequent disciplinary action based upon it. This court holds that Scherer's resignation, which he submitted only after getting agreement that the department would "drop it all in Tallahassee," constituted a waiver of his rights of appeal to the Career Service Commission. Cf. State of Florida Dept. of Transportation v. State of Florida Career Service Commission, 366 So.2d 473 (Fla. 1st DCA 1979). A knowing and voluntary resignation waives any right to the procedural protections to which an

employee would otherwise be entitled. Van Arsdel v. Texas A & M University, 628 F.2d 344, 345 (5th Cir. 1980); Stewart v. Bailey, 556 F.2d 281, 285-86 (5th Cir. 1977). The motion of Defendants Blakemore and Beach for a directed verdict, ruling on which was deferred at trial, is granted with respect to Scherer's claims for back pay and injunctive relief based on his January 13, 1979 separation from his Career Service employment.

C. Infringement of Plaintiff's Liberty Interest.

The court finds no merit to plaintiff's contention that he had a liberty interest in his secondary employment which was infringed by the actions of defendants Beach and Davis by their denial, without hearing, of permission to work a second job. See Meachum v. Fano, 427 U.S. 215 at 224, 226-7; 49 L.Ed.2d 451 (1976); Montanye

v. Haynes, 427 U.S. 236 at 242-3, 49 L.Ed.2d 466 (1976).

Plaintiff has advanced another due process argument, claiming under 42 USC §1983 a denial of fundamental due process by stigmatization, that is, an injury to reputation, good name and integrity as the result of the termination of his employment. Not every defamation of an individual by the government is constitutionally protected as a liberty interest. Such a liberty interest can arise only in specific contexts and is dependent upon as special relationship between the individual and the government. The Supreme Court has held that in the public employee context, a liberty interest arises if an individual has been terminated in a manner "that might seriously damage his standing and association in the community" or foreclose

"his freedom to take advantage of other employment opportunities." Board of Regents v. Roth, supra, 408 U.S. at 573. See Dennis v. S&S Consolidated Rural H.S. Dist., 577 F.2d 338, 340 (5th Cir. 1978); Kaprelian v. Texas Woman's University, 509 F.2d 133, 137 (5th Cir. 1975).

One's concern for his reputation in the public employment context, without a tangible interest in that employment, is not sufficient to invoke the due process clause. Paul v. Davis, 424 U.S. 693 (1976). The Fifth Circuit terms that requirements "stigma plus", so that an individual must be "stigmatized in connection with a denial of a right or status previously recognized under state law." Dennis, supra, 577 F.2d at 341. As discussed supra, Scherer has shown a property interest sufficient to invoke procedural due process. Yet, in the governmental employee context,

> [i]t is the individual's status as a government employee and not his property interest in continued employment which furnished the "plus" that raises reputation to the level of a constitutionally protected liberty interest.

Dennis, supra, 577 F.2d at 343. Finally, plaintiff must have established that the stigmatizing fact was "substantially false." Codd v. Velger, 429 U.S. 624, 627 (1977); McElwee v. Todd, 581 F.d 1182 (5th Cir. 1978). Scherer has not presented evidence sufficient to establish his claims of stigmatization.

The court further finds no evidence that the incidents of harassment that plaintiff experienced following his re-instatement with the FHP were in any way orchestrated or directed by defendants Beach and Davis. In accordance with the holdings of Rizzo v. Goode, 423 U.S. 362 at 370-1, 46 L.Ed.2d 561 (1976); Duchesne v.

Sugarman, 566 F.2d 817 at 831 (2nd Cir. 1977); and Wanger v. Bonner, 621 F.2d 675 at 680-1 (5th Cir. 1980), this court grants the defendants' motion for a directed verdict, with respect to plaintiff's claims of infringement of a liberty interest and his claims of denial of his right of privacy. In all other respects, the motion for a directed verdict is denied. See 5 J. Moore, Federal Practice, ¶50; 2[1][(2d ed.).

D. Qualified Immunity

As public officials, defendants Davis and Beach enjoy a quaified immunity which limits their liability for damages. Scheuer v. Rhodes, 416 U.S. 232 (1974); Cruz v. Beto, 603 F.2d 1178 (5th Cir. 1979). That immunity can be lost if the constitutional rights allegedly infringed by the defendants were "clearly estab-

lished" at the time of the defendants' challenged conduct; if defendants knew or should have known of those rights and if they knew or should have known that their conduct violated the constitutional norm. Procunier v. Navarette, 434 U.S. 555, 562 (1978); Wood v. Strickland, 420 U.S. 308, 322 (1975); Cruz v. Beto, supra at 1183.

The Supreme Court's decisions in Board of Regents v. Roth, supra and Perry v. Sinderman, supra issued in 1972, with Arnett v. Kennedy following in 1974. The Attorney General of the State of Florida rendered an opinion in 1975 that the "terminated for cause" provision of Section 110.061, Florida Statutes, created a property interest in their jobs for permanent Career Service employees and that such property interest was protected by the Due Process Clause of the Fourteenth Amendment. As of 1975, all that was

arguably unsettled was exactly what procedures would protect that interest. This remaining question was answered with the decision in Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1976) on May 20, 1976. The petition for writ of certiorari in Thurston v. Dekle was not granted until June 26, 1978 and only that portion of the case affected by the Supreme Court's decision in Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658 (1978) was vacated. Thurston v. Dekle, 438 U.S. 901, 57 L.Ed.2d 1144 (1978), on remand 578 F.2d 1167 (5th Cir. 1978). See also Bundy v. Rudd, 581 F.2d 1126 at 1131, n.2 (5th Cir. 1978); Glenn v. Newman, 614 F.2d 467 at 472 (5th Cir. 1980). In the face of the above-cited decisions, the law with regard to pretermination procedures was clearly established prior to this court's ruling in Prince v. Lewis, TCA 75-149 (N.D. Fla. December 8, 1978).

Plaintiff Scherer's due process rights were clearly established at the time of his October 24, 1977 dismissal from the FHP and defendants Beach and Davis, as officials charged with the responsibility of making dismissal decisions for the Department of Highway Safety and Motor Vehicles reasonably should have known that their failure to provide any pre-termination procedure violated plaintiff's constitutional rights. Thus, although this court finds no evidence of malicious intention on the part of defendants Beach and Davis, it holds that their actions cannot reasonably be characterized as being in good faith. See Wood v. Strickland, 420 U.S. 308 at 322, 43 L.Ed.2d 214 (1975); Bogard v. Cook, 586 F.2d 399 at 411-12 (5th Cir. 1978). Defendants Beach and Davis are thus held to be liable for the compensatory damages which plaintiff has proven on claims not

compromised by his settlement with the department. Further, because this court has found that the dismissal decision of Beach and Davis violated the department's own disciplinary guidelines, the court finds exemplary damages to be appropriate.[4]

E. Damages

As earlier held, plaintiff may not recover additional lost wages from the period of unemployment following the October 20, 1977 discharge until his reinstatement on August 4, 1978, having settled that claim in his Career Service Commission hearing. Neither may he recover herein for the unrecompensed attorney's fees incurred in that proceeding, because the commission's award of a reasonable attorney's fee was a part of his settlement in the prior proceeding.

As damages for his physical and mental pain and suffering following the October

1977 discharge, the court hereby awards one hundred dollars ($100.00) a week for his forty-two (42) weeks of unemployment, or a total of four thousand two hundred dollars ($4200.00).

Although plaintiff seeks damages from his adjudication of bankruptcy, the court is unable to view the bankruptcy as directly and causally connected to plaintiff's 1977 termination, the petition having been filed at the end of 1979, after plaintiff had been reinstated and employed with only the interruption of a matter of days between his second job separation from the highway patrol and his employment with the Escambia County Sheriff's Office. In the absence of plaintiff's proof of causal connection between the 1977-78 unemployment and the 1980 bankruptcy, this court denies plaintiff's request for damages measured by the affects of his having been adjudged bankrupt.

The court awards exemplary damages against Col. J. E. Beach and Ralph Davis at the rate of two thousand five hundred dollars ($2500.00) each, for a total exemplary damage award of five thousand dollars ($5000.00) to plaintiff.

ORDER

In accordance with all of the foregoing, it is ORDERED AND ADJUDGED:

1. Plaintiff's claims herein for declaratory relief, compensatory relief other than lost wages, and punitive damages based on his October 20, 1977 termination from Career Service employment with the State of Florida are not barred by virtue of voluntary and knowing settlement of his Career Service Commission proceeding against the Department of Highway Safety and Motor Vehicles.

2. Section 110.061, Florida Statutes (1977) and its implementing rules are unconstitutional insofar as (1) they fail to mandate pre-termination procedures which safeguard the rights of employees, (2) they fail to provide a prompt post-termination hearing, and (3) they fail to guarantee back pay to an employee determined to have been dismissed without just cause.

3. Defendants' motion for directed verdict is granted with respect to plaintiff's claims in Count I of infringement of a constitutionally recognized liberty interest and with respect to all plaintiff's claims in Count II.

4. Defendants Ralph Davis and Col. J. E. Beach are not entitled to the qualifying good faith immunity defense from liability for plaintiff's damages from his October

1977 termination from employment, the law with regard to pre-termination procedural due process having been settled by the time of their actions.

5. Plaintiff is entitled to four thousand two hundred dollars ($4200.00) in compensatory damages for his mental and physical pain and suffering.

6. Exemplary damages are awarded to plaintiff because of the failure of Ralph Davis and Col. J. E. Beach to follow the disciplinary guidelines of the Department of Highway Safety and Motor Vehicles in making their decision of October 24, 1977 to terminate G. S. Scherer from his employment with the Florida Highway Patrol.

7. Plaintiff is entitled to twenty five hundred dollars ($2500.00) in exemplary damages from Col. J. E. Beach and twenty five hundred dollars ($2500.00) in exemplary damages from Ralph Davis.

8. Plaintiff's suspension of January 10, 1977 from Career Service employment, pending investigation of a charge of destruction of state property, did not offend the requirements of the Due Process Clause of the Fourteenth Amendment.

9. Plaintiff's voluntary and knowing resignation of his Career Service employment, based on agreement of the Department of Highway Safety and Motor Vehicles to abandon its investigation of charges against him of destruction of State property, constituted a waiver of his right of appeal pursuant to Section 110.061, Florida Statutes (1978 Supp.).

10. Plaintiff is entitled to his attorneys' fees and costs for litigation of the claims herein which were not barred by the prior settlement of his Career Service Commission proceeding. Plaintiff has 10 working days from the date of his order to

submit affidavits on attorneys' fees and costs to defendants. Defendants have 10 working days in which to respond. Following such response, the parties have 10 working days in which to negotiate a settlement of the amount to be awarded. If settlement cannot be made, the court will entertain a motion for said award.

11. The Clerk of this Court will enter judgment accordingly.

DONE AND ORDERED this 15th day of July, 1981.

/s/
WILLIAM STAFFORD
CHIEF JUDGE

FOOTNOTES FOLLOW

FOOTNOTES: Gregory Scott Scherer v. Ralph Davis, et al., TCA 79-0885

1. Troopers E. D. Sapp and S. R. Bevis of Troop A (Sconiers' troop) also requested authorization to work secondary employment as security personnel on the Universal Studio's set in Santa Rosa County. They received approval which was never revoked.

2. Although back pay is not guaranteed a Career Service Employee found by the commission to have been unjustly discharged, §110.061, F.S., Scherer's acceptance of partial backpay in settlement must be held to bar any further backpay award he might be able to prove herein in accordance with the Fifth Circuit's Strozier and U.S. v. Allegheny-Ludlum decisions.

3. Granting a motion for expedited hearing is apparently within the discretion of the commission. Thus, failure to request expedited hearing cannot be held to constitute acquiescence in the delay in the appeal process created by Florida Statute. The notion that one must request expedited hearing in hopes of obtaining minimal due process only points out the absence of minimal due process in the standard statutorily-created process.

4. These damages should not be considered PUNITIVE damages, which would have been awarded if the defendants' actions demonstrated malicious intention. They are, rather, EXEMPLARY damages, awarded solely on the basis of defendants' failure to follow the department's disciplinary guidelines. Although Beach and Davis

evidently consulted both the department's personnel director and the department's legal counsel before making the final dismissal decision, Beach and Davis are the officials charged with responsibility for the official action of dismissal.

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT

for the

NORTHERN DISTRICT OF FLORIDA

CIVIL ACTION FILE
NO. TCA 79-0885

JUDGMENT

GREGORY SCOTT SCHERER,

vs.

RALPH DAVIS, individually; CHESTER BLAKEMORE, officially as Director of the Department of Highway Safety and Motor Vehicles; and J. ELDREDGE BEACH, individually and as Director of the Florida Highway Patrol, Department of Highway Safety and Motor Vehicles,

This action came on for trial before the Court, Honorable William Stafford, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged

1. Plaintiff's claims herein for declaratory relief, compensatory relief other than lost wages, and punitive damages based on his October 20, 1977, termination from Career Service employment with the State of Florida are not barred by virtue of voluntary and knowing settlement of his Career Service Commission proceeding against the Department of Highway Safety and Motor Vehicles.

2. Section 110.061, Florida Statutes (1977) and its implementing rules are unconstitutional insofar as (1) they fail to mandate pre-termination procedures which safeguard the rights of employees, (2) they fail to provide a prompt post-termination hearing, and (3) they fail to guarantee back pay to an employee determined to have been dismissed without just cause.

3. Defendants' motion for directed verdict is granted with respect to

plaintiff's claims in Count I of infringement of a constitutionally recognized liberty interest and with respect to all of plaintiff's claims in Count II.

4. Defendants Ralph Davis and Col. J. E. Beach are not entitled to the qualifying good faith immunity defense from liability for plaintiff's damages from his October 1977 termination from employment, the law with regard to pre-termination procedural due process having been settled by the time of their actions.

5. Plaintiff, Gregory Scott Scherer, shall recover from defendants, Ralph Davis and J. Eldredge Beach, the sum of $4,200.00 in compensatory damages for his mental and physical pain and suffering.

6. Exemplary damages are awarded to plaintiff because of the failure of Ralph Davis and Col. J. E. Beach to follow the disciplinary guidelines of the Department

of Highway Safety and Motor Vehicles in making their decision of October 24, 1977, to terminate G. S. Scherer from his employment with the Florida Highway Patrol.

7. Plaintiff, Gregory Scott Scherer, shall recover from defendant Col. J. E. Beach the sum of $2,500.00 in exemplary damages and from defendant Ralph Davis the sum of $2,500.00 in exemplary damages.

8. Plaintiff's suspension of January 10, 1977, from Career Service employment, pending investigation of a charge of destruction of state property, did not offend the requirements of the Due Process Clause of the Fourteenth Amendment.

9. Plaintiff's voluntary and knowing resignation of his Career Service employment, based on agreement of the Department of Highway Safety and Motor Vehicles to abandon its investigation of charges against him of destruction of State

property, constituted a waiver of his right of appeal pursuant to Section 110.061, Florida Statutes (1978 Supp.).

10. Plaintiff is entitled to his attorneys' fees and costs for litigation of the claims herein which were not barred by the prior settlement of his Career Service Commission proceeding. Plaintiff has 10 working days from the date of this order to submit affidavits on attorneys' fees and costs to defendants. Defendants have 10 working days in which to respond. Following such response, the parties have 10 working days in which to negotiate a settlement of the amount to be awarded. If settlement cannot be made, the court will entertain a motion for said award.

Dated at Tallahassee, Florida, this 17th day of July, 1981.

MARVIN S. WAITS, Clerk

By /s/
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GREGORY SCOTT SCHERER,

Plaintiff,

v. TCA 79-0885

RALPH DAVIS, individually; CHESTER BLAKEMORE, officially as Director of the Department of Highway Safety and Motor Vehicles; and J. ELDREDGE BEACH, individually and as Director of the Florida Highway Patrol, Department of Highway Safety and Motor Vehicles,

ORDER AMENDING JUDGMENT

Defendants.

Before the court is defendants' motion to alter judgment (Document 112) to which plaintiff responded in Document 114. Defendants have alleged error in four areas of the memorandum opinion and order (Document 108). Each point is discussed below.

Qualified Immunity

The language of 42 U.S.C. §1983 is absolute and unqualified: "Every person who, under color of any statute . . . [or] custom . . ., of any State . . ., subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . ." Although the statutes itself embodies no immunities, courts have created a qualified immunity for public officials whose positions require the exercise of discretion in the performance of their duties. Scheuer v. Rhodes, 416 U.S. 232 (1974). The Scheuer Court held:

> [A] qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time

> of the action on which liability is ought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."

Id. at 247-48.

The next term the Supreme Court enunciated a two-pronged immunity standard which contained an objective test requiring reasonable grounds for the official's belief in the legality of the challenged conduct and a subjective test for good faith. Wood v. Strickland, 420 U.S. 308 (1975). The criterion for the objective prong is whether the official knew or reasonably should have known that the action he took within his sphere of official responsibility violated a basic, unquestioned constitutional right of his charge. Id. at 322. In the subjective

context, the public official will be found not to have acted in good faith if he took the action with the malicious intention to cause a deprivation of a constitutional right. Id.

In my memorandum opinion and order (Document 108) in this case, dated July 15, 1981, I found that defendants Beach and Davis lost their qualified immunity based on the objective test. Reasoning that Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1967) [sic] settled the exact procedures to protect an employee's property interest in his job, this court determined that Scherer's due process rights were clearly established at the time of his October 24, 1977 dismissal from the Florida Highway Patrol. Five days later, however, the Fifth Circuit affirmed Judge Higby's ruling in Weisbrod v. Donigan, TCA 79-813 (N.D. Fla. 1980), 651 F.2d 334 (5th Cir. 1981).

Unlike my conclusion, Judge Higby found that "[t]he right of a permanent state employee to a pre-termination conference was established as the result of a series of decisions which were rendered in late 1978." TCA 79-813, Document 46, p. 8. Judge Higby's Weisbrod opinion specifically rejected the determination that Thurston clearly established pre-termination due process procedures. The pertinent actions in Weisbrod occurred from June 17, 1977 through June 7, 1978, and yet the Fifth Circuit held that the "defendants did not act in disregard of any well-settled constitutional rights." 651 F.2d at 336.[1] Certainly it cannot be said that the Fifth Circuit was unaware of its own decision in Thurston. In fact, Circuit Judge Morgan was on both the Thurston and Weisbrod panels. Thus, the law of this circuit is that pre-termination due process

procedures were clearly established in late 1978; and accordingly that portion of Document 108 inconsistent with that holding must be vacated.

Although the issue of whether a clearly established constitutional right was violated must be resolved against plaintiff, defendants can take little comfort therein. Wood's duty to know well-settled constitutional rights only supplements the more general reasonable grounds requirement of Scheuer. If an official violates an employee's clearly established constitutional right, it is easier, but not the sole way, to find the official's behavior unreasonable.

Plaintiff suggests that this court should adhere to a recent Fifth Circuit decision which held that officials were not entitled to qualified immunity when they violated clearly established state law.

Williams v. Treen, 671 F.2d 892 (5th Cir. 1982). This court finds Williams partially persuasive. Significantly, the Fifth Circuit recognized the general "reasonable grounds" requirement enunciated in Scheuer when no well-settled constitutional right existed at the time of the challenged conduct. Id. at 897-900. This court, however, declines to follow the holding that "[i]f an official's conduct contravenes his own state's explicit and clearly established regulations, a subjective belief in the lawfulness of his actions is per se unreasonable." Id. at 899. Instead, this court is of the view that if an official violates his agency's explicit regulations, which have the force of state law, it is evidence that his conduct is unreasonable. The court however, must consider the totality of the circumstances. Scheuer, 416 U.S. at 247-48.

In the instant case, the Florida Highway Patrol adopted personnel rules and regulations which provided:

> Upon receiving a report of . . . a violation of Department or Division rules and regulations . . ., the Director shall order a complete investigation to determine the true facts concerning the circumstances surrounding the alleged offense. The completed investigation report will also contain a written statement made by the employee against whom the complaint was made. If after a thorough study of all information concerning the violation, the Director decides that a . . . dismissal will be in order, he will present the employee in writing with the reason or reasons for such actions.

General Order No. 43 § 1.C (September 1, 1977). This order was promulgated pursuant to section 120.53(1)(a) of the Florida Statutes, see Chapter 15B-11.14, Florida Administrative Code, and has the effect of statutory law. McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977).

Declaratory Relief

This court's memorandum opinion and order held:

> Section 110.061, Florida Statutes (1977) and its implementing rules are unconstitutional insofar as (1) they fail to mandate pre-termination procedures which safeguard the rights of employees, (2) they fail to provide a prompt post-termination hearing, and (3) they fail to guarantee back pay to an employee determined to have been dismissed without just cause.

Document 108, p. 23.

The Declaratory Judgment Act applies only in "a case of actual controversy," 28 U.S.C. §2201, and there is no actual controversy if a matter has become moot. Golden v. Zwickler, 394 U.S. 103 (1969). Moreover, there must be a controversy at the time the court acts. Id.; see also Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972).

The legislature repealed section 110.061 of the Florida Statutes in 1979.

During that same session, the legislature enacted section 110.227(5)(a) of the Florida Statutes which provides for constitutionally sufficient pre-termination procedures.

Additionally, defendants correctly note that by order dated June 13, 1980 (Document 72) this court held that plaintiff had no standing to complain of the unconstitutionality of Chapter 110, Florida Statutes on the basis of its failure to guarantee back pay for a wrongfully dismissed employee because Scherer had in effect settled his claim prior to his Career Service Commission hearing. Accordingly, that portion of the memorandum opinion and order declaring the statute unconstitutional for its failure to mandate pre-termination procedures which safeguard employees' rights and to guarantee back pay must be vacated.

In accordance with the foregoing, the final order in this case is amended and it is hereby ORDERED AND ADJUGED:

1. Plaintiff's claims herein for declaratory relief, compensatory relief other than lost wages, and punitive damages based on his October 20, 1977 termination from Career Service employment with the State of Florida are not barred by virtue of voluntary and knowing settlement of his Career Service Commission proceeding against the Department of Highway Safety and Motor Vehicles.

2. Chapter 110, Florida Statutes (1981) and its implementing rules are unconstitutional insofar as they fail to provide a prompt post-termination hearing.

3. Defendants' motion for directed verdict is granted with respect to plaintiff's claims in Count I of infringement of a constitutionally recognized

liberty interest and with respect to all of plaintiff's claims in Count II.

4. Defendants Ralph Davis and Col. J. E. Beach are not entitled to the qualified good faith immunity defense from liability for plaintiff's damages from his October 1977 termination from employment.

5. Plaintiff is entitled to four thousand two hundred dollars ($4200.00) in compensatory damages for his mental and physical pain and suffering.

6. Plaintiff's suspension of January 10, 1977 from Career Service employment, pending investigation of a charge of destruction of state property, did not offend the requirements of the due process clause of the fourteenth amendment.

7. Plaintiff's voluntary and knowing resignation of his Career Service employment, based on agreement of the Department of Highway Safety and Motor

Vehicles to abandon its investigation of charges against him of destruction of state property, constituted a waiver of his right of appeal pursuant to Section 110.061, Florida Statutes (1978 Supp.).

8. Plaintiff is entitled to his attorneys' fees and costs for litigation of the claims herein which were not barred by the prior settlement of his Career Service Commission proceeding. Plaintiff has ten working days from the date of this amended order to submit affidavits on attorneys' fees and costs to defendants. Defendants have ten working days to respond. Following such response, the parties have ten working days to negotiate a settlement of the amount to be awarded. If settlement cannot be made, the court will entertain a motion for said award.

9. The Clerk of this Court will amend judgment accordingly.

DONE AND ORDERED this 7th day of June, 1982.

/s/
WILLIAM STAFFORD
CHIEF JUDGE

FOOTNOTE:

1. In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) the Eleventh Circuit adopted Fifth Circuit precedent.

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF FLORIDA

GREGORY SCOTT SCHERER,

vs.

RALPH DAVIS, individually; CHESTER BLAKEMORE, officially as Director of the Department of Highway Safety and Motor Vehicles; and J. ELDREDGE BEACH, individually and as Director of the Florida Highway Patrol, Department of Highway Safety and Motor Vehicles,

AMENDED JUDGMENT

This action came on for trial (hearing) before the Court, Honorable William Stafford, Chief, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged

1. Plaintiff's claims herein for declaratory relief, compensatory relief other than lost wages, and punitive damages based on his October 20, 1977 termination from Career Service employment with the State of Florida are not barred by virtue of voluntary and knowing settlement of his Career Service Commission proceeding against the Department of Highway Safety and Motor Vehicles.

2. Chapter 110, Florida Statutes (1981) and its implementing rules are unconstitutional insofar as they fail to provide a prompt post-termination hearing.

3. Defendants' motion for directed verdict is granted with respect to plaintiff's claims in Count I of infringement of a constitutionally recognized liberty interest and with respect to all of plaintiff's claims in Count II.

4. Defendants Ralph Davis and Col. J. E. Beach are not entitled to the qualified good faith immunity defense from liability for plaintiff's damages from his October 1977 termination from employment.

5. Plaintiff is entitled to four thousand two hundred dollars ($4200.00) in compensatory damages for his mental and physical pain and suffering.

6. Plaintiff's suspension of January 10, 1977 from Career Service employment, pending investigation of a charge of destruction of state property, did not offend the requirements of the due process clause of the fourteenth amendment.

7. Plaintiff's voluntary and knowing resignation of his Career Service employment, based on agreement of the Department of Highway Safety and Motor Vehicles to abandon state property, [sic] constituted a waiver of his right of appeal

pursuant to Section 110.061, Florida Statutes (1978 Supp.).

8. Plaintiff is entitled to his attorneys' fees and costs for litigation of the claims herein which were not barred by the prior settlement of his Career Service Commission proceeding. Plaintiff has ten working days from the date of this amended order to submit affidavits on attorneys' fees and costs to defendants. Defendants have ten working days to respond. Following such response, the parties have ten working days to negotiate a settlement of the amount to be awarded. If settlement cannot be made, the court will entertain a motion for said award.

Dated at Tallahassee, Florida, this 14th day of June, 1982.

MARVIN S. WAITS,
Clerk of Court

By /s/
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5813
No. 83-3034
Non-Argument Calendar

GREGORY SCOTT SCHERER, Et Al.,

Plaintiffs-Appellees

versus

ROBERT GRAHAM, Et Al.,

Defendants-Appellants.

GREGORY SCOTT SCHERER, Et Al.,

Plaintiffs-Appellees,

versus

ROBERT GRAHAM, Et Al.,

Defendants-Appellants.

- - - - - - - - - - - - - - -

Appeals from the
United States District Court for the
Northern District of Florida

- - - - - - - - - - - - - - -

(June 30, 1983)

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

GREGORY SCOTT SCHERER,

Plaintiff/Appellee,

vs. Case Nos. 82-5813
83-3034

RALPH DAVIS, et al.,

Defendants/Appellants.

_____/

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Ralph Davis, individually, Chester Blakemore, officially as Director of the Department of Highway Safety and Motor Vehicles, and J. Eldredge Beach, individually and as Director of the Florida Highway Patrol, Department of Highway Safety and Motor Vehicles, hereby appeal to the Supreme Court of the United States from the decision of this Court entered on June 30,

1983, and from the denial of Petition for Panel Rehearing entered on August 23, 1983, affirming the district court's order on the basis of the Memorandum Opinion and Order of the district judge.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

Respectfully submitted,

JIM SMITH
Attorney General

/s/
BRUCE A. MINNICK
Assistant Attorney General

/s/
VICKI GORDON KAUFMAN
Assistant Attorney General

Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, Florida 32301
(904) 488-1573

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal to the Supreme Court of the United States has been furnished by United States Mail to BEN R. PATTERSON, 1215 Thomasville Road, Post Office Box 4289, Tallahassee, Florida 32303, this 31st day of August, 1983.

/s/

Office - Supreme Court, U.S
FILED
FEB 9 1984
ALEXANDER L. STEVAS
CLERK

CASE NO. 83-490
IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

RALPH DAVIS, individually, CHESTER BLAKEMORE, officially as the Director of the Department of Highway Safety and Motor Vehicles; and J. ELDREDGE BEACH, individually and as Director of the Florida Highway Patrol, Department of Highway Safety and Motor Vehicles, Appellants,

v.

GREGORY SCOTT SCHERER, Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

JOINT APPENDIX

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Appeal Docketed September 21, 1983
Probable Jurisdiction Noted
December 12, 1983

JOINT APPENDIX

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OMITTED JUDGMENTS AND ORDERS

The following opinions, decisions, judgments, and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Jurisdictional Statement.

Memorandum Opinion and Order of the District Court for the Northern District of Florida, Tallahassee Division, July 15, 1981 . . . . . 1a

Judgment of the District Court for the Northern District of Florida, Tallahassee Division, July 17, 1981 . . . . . 56a

Order Amending Judgment of the District Court for the Northern District of Florida, Tallahassee Division, June 7, 1982 . . . . . 62a

Amended Judgment of the District Court for the Northern District of Florida, Tallahassee Division, June 14, 1982 . . . . . 79a

Order of the Court of Appeals for the Eleventh Circuit, June 30, 1983 . . . . . 83a

Order of the Court of Appeals for the Eleventh Circuit denying Petition for Rehearing, August 22, 1983 . . . . . 85a

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

GREGORY SCOTT SCHERER

v.

RALPH DAVIS, etc., et al.,

No. TCA 79-0885

1.	Complaint.	June 1, 1979
2.	Defendants' Motion to Dismiss.	Aug. 6, 1979
3.	Answer.	Sept. 19, 1979
4.	Defendants' Motion to Sever Claims.	Dec. 26, 1979
5.	ORDER: Defendants' Motion to Sever Plaintiffs' Claims GRANTED. Action dismissed as to claims of Plaintiffs Gray, Warren, Forrester and Walsh. Action dismissed as to Defendants Graham, Firestone, Smith, Lewis, Turlington, Doyle, Gunter, Wainwright, Roesch, Bran, Madden, Page, U. Davis, Pingree, King and Robertson. Plaintiff Scherer given 10 days	

	from date of Order to amend complaint.	April 14, 1980
6.	Amended Complaint.	Sept. 11, 1980
7.	Answer.	Sept. 25, 1980
8.	Non-Jury Trial.	April 6-7, 1981
9.	Memorandum Opinion and Order.	July 16, 1981
10.	Judgment.	July 17, 1981
11.	Plaintiff's Motion for Attorney Fees and Costs.	July 23, 1981
12.	Defendants' Motion to Alter Judgment.	July 28, 1981
13.	Plaintiff's Response to Motion to Alter Judgment.	Aug. 11, 1981
14.	ORDER: Amending Judgment.	June 7, 1982
15.	Amended Judgment.	June 14, 1982
16.	Defendants' Notice of Appeal.	July 7, 1982
17.	ORDER: Awarding Attorneys' Fees and Costs.	Dec. 16, 1982
18.	Judgment.	Dec. 16, 1983

19.	ORDER: Amending Judgment on Attorneys' Fees.	Dec. 23, 1982
20.	Amended Judgment.	Dec. 23, 1982

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 82-5812
83-3034
(Consolidated)

1.	Appellants' Brief, Filed	Feb. 28, 1983
2.	Appellee's Brief, Filed	April 1, 1983
3.	Appellants' Reply Brief, Filed	April 20, 1983
4.	Order, Rule 25 Affirmance	June 30, 1983
5.	Appellants' Petition for Panel Rehearing, Filed	July 18, 1983
6.	Rehearing Denied	Aug. 22, 1983
7.	Notice of Appeal to the Supreme Court of the United States, Filed	Sept. 2, 1983

3. As a permanent Career Service employee of the State of Florida, Plaintiff could only be terminated from his employment for just cause, and, therefore, had property rights in his continued employment with the State of Florida protected by the Fifth and Fourteenth Amendments to the United States Constitution. Those rights are set forth in Chapter 110, Florida Statutes, §447.209, Florida Statutes, Rules 22A-7.10(7)(b), 22A-10.02, 10.03, 10.05, F.A.C., General Order #43 of the Florida Highway Patrol Manual, and §2 of the Personnel Rules and Regulations of the Department of Highway Safety and Motor Vehicles.

4. All of the Defendants, with the exception of Defendant DAVIS, are sued in their official capacities, inasmuch as the State of Florida, its officers, officials, agencies, agency heads, and employers are

"persons" within the meaning of 42 U.S.C., §1983, and insofar as the acts complained of herein constitute the official policy, custom, or usage of the State of Florida and the Defendants herein. The relief sought against these Defendants is injunctive and declaratory relief, as well as monetary damages.

5. Certain Defendants are sued in their individual capacities as well, inasmuch as these Defendants, individually, are "persons" within the meaning of Title 42 U.S.C., §1983. The relief sought against these Defendants in their individual capacities is injunctive, declaratory, and monetary relief.

III.

Parties

6. Plaintiff SCHERER is a citizen of the United States and of the State of Florida. He was a Radio-Teletype Operator with the State of Florida Department of Highway Safety and Motor Vehicles.

7. Defendant RALPH DAVIS was, and CHESTER BLAKEMORE is, the Director of the Department of Highway Safety and Motor Vehicles, State of Florida. Defendant J. ELDREDGE BEACH is Director of the Florida Highway Patrol, Department of Highway Safety and Motor Vehicles, State of Florida.

IV.

Causes of Action

Count I--Denial of Fourteenth Amendment Due Process

8. Paragraphs 1 through 7 of this complaint are incorporated herein and realleged as if fully set forth.

9. Plaintiff was a permanent Career Service employee of the State of Florida. The Plaintiff received a letter from Defendants DAVIS and BEACH, dated October 25, 1977, notifying him of his dismissal from employment, effective that date, and further notifying him of his appeal rights to the Career Service Commission of Florida.

10. This court is requested to take judicial notice of the laws and administrative rules of the State of Florida, as recited in paragraph 3 of this complaint.

11. Prior to termination, Plaintiff was not permitted to defend the charges against him before the ultimate decision-maker, or an impartial individual, nor was he allowed to confront and cross-examine those responsible for the allegations made against him, nor was he given sufficient

notice of the proposed adverse action, nor was he permitted to review statements of witnesses, documents, or investigative reports relied upon by the agency to support its adverse action, nor was any procedure utilized which required the terminating officials to demonstrate, show, or prove that Plaintiff committed an act warranting dismissal, nor was he permitted to be represented by a person or an attorney of his choosing.

12. The Plaintiff appealed his dismissal to the Career Service Commission, pursuant to Rule 22A-10.05 of the Career Service Commission Rules, and Florida Statutes, §110.061.

13. The Plaintiff received an opportunity for a post-termination hearing nine and one-half (9 1/2) months after dismissal.

14. Prior to the hearing, and to avoid the then and now customary waiting period for the Career Service Commission of ninety (90) days, and the frequent refusal of the agency to abide by such decision while the agency proceeds with appeal, the Plaintff agreed to settle his dispute with the agency. The settlement was further necessitated by the Plaintiff's understanding that the Career Service Commission, even if it reinstated him, was not obliged to require the agency to award back pay. The Plaintiff was further disadvantaged by a lack of litigational resources, particularly when compared with that available to the agency.

15. The settlement reached provided for an amount which was less than the Plaintitt's [sic] rate of pay prior to the discharge.

16. The agency, through the Defendants, used its resources and the treat of delay to force the Plaintiff to accept the settlement described above. In doing so, the Defendants knew that the discharge action taken by them would be reversed by the Career Service Commission.

17. The acts of all Defendants complained of herein are the implementation or execution of the official policy, custom, or usage of the State of Florida, the various agencies of the State of Florida, and the named Defendants.

18. The individual Defendants acted, as alleged in the paragraphs of this complaint, willfully and maliciously, arbitrarily and capriciously, under color of law, to deny the Plaintiff his rights to liberty and property under the Constitutions of the United States and the State of Florida, and the laws, all without

providing Fourteenth Amendment substantive and procedural due process.

19. As a result of theactions of the Defendants as set forth herein, Plaintiff has been subjected to severe financial hardship.

20. As a result of the actions of the Defendants as set forth herein, Plaintiff has been subjected to public ridicule and suffered severe emotional distress.

21. As a result of the actions of the Defendants as set forth herein, Plaintiff has been compelled to defend his rights guaranteed by the United States Constitution before this court. He has required the assistance of counsel and has incurred, and will incur, a sizeable attorney's fee.

22. As a direct result of the actions of the Defendants as set forth herein, Plaintiff has been indelibly stigmatized in

the public mind, and Plaintiff's employment potential has been permanently impaired and damaged.

23. There is an actual controversy now existing between the parties to this action. Plaintff is in doubt about his status and rights under the Constitution of the United States, and seeks that this court declare and define the rights and other legal relations of the parties.

24. As a result of the gross, willful, and malicious conduct of the individual Defendants as described herein, this action presents appropriate circumstances for a substantial award of exemplary damages against those particular individual Defendants.

Count II--Denial of First and Ninth Amendment Right of Privacy

25. Paragraphs 1 through 24 of this complaint are incorporated herein and realleged as if fully set forth.

26. On October 24, 1977, the Plaintiff was terminated from his position for his alleged violation of the Department's dual employment and compensation policy because he allegedly failed to receive written approval prior to engaging in dual employment.

27. Plaintiff challenged the agency's dual employment rule as being illegal and improperly and invalidly adopted. On June 28, 1978, a hearing officer of the State Division of Administrative Hearings declared that the rule was, indeed, improperly promulgated and, therefore, had no legal effect whatsoever.

28. The dual employment in which Plaintiff originally engaged in now [sic] way interfered with this employment with the State of Florida. The termination of Plaintiff for his choice to work a second job in the evenings violated his rights to

privacy, his fundamental right to work and earn a living and to acquire and possess property from the fruits of his labor, as is guaranteed by the United States Constitution. These rights can only be regulated by narrowly tailored police regulations that serve an important governmental interest. Plaintiff was arbitrarily denied that right and suffered still further emotional distress and other damagesas a result thereof.

29. The individual Defendants herein continue to harass Plaintiff in his employment, or in the case of supervisors, refused to investigate or otherwise discipline the persons responsible for the harassment. Harassment came in many forms, such as changing shift assignments, last minute changes in vacation time, and other subtle harassment techniques. These harassment techniques continued to deprive

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished, by pre-paid United States Mail, to Pamela L. Lutton, Esq., Assistant Attorney General, Department of Legal Affairs, Suite 1501, The Capitol, Tallahassee, Florida 32301, this 10th day of September, 1980.

/s/
Ben R. Patterson

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA,
TALLAHASSEE DIVISION

Case No. TCA 79-0885

GREGORY SCOTT SCHERER,
Plaintiff,

vs.

RALPH DAVIS, et al.,

Defendants.

ANSWER

Defendants, by and through their undersigned counsel answer the Amended Complaint in the cause as follows:

FIRST DEFENSE

This court lacks subject matter jurisdiction over the claims for damages against Defendants in their official capacities.

SECOND DEFENSE

The Amended Complaint fails to state a claim upon which relief may be granted.

THIRD DEFENSE

1. Defendants admit the allegations contained in the third sentence of paragraph 1, the first sentence of paragraph 2, the first sentence of paragraph 3, the first sentence of paragraph 5, paragraph 6, paragraph 7, paragraph 9, paragraph 12, paragraph 13, paragraph 26, and the first sentence of paragraph 27.

2. Defendants admit the allegations contained in paragraph 14, that prior to the Career Service Commission hearing the Plaintiff settled his dispute with the agency. Defendants are without sufficient knowledge as to the remaining allegations of that paragraph and therefore deny them.

3. Defendants admit the allegations contained in the second sentence of paragraph 27 except the conclusion as to the "legal effect" is denied.

4. Defendants deny the allegations contained in the third sentence of paragraph 1, paragraph 2, paragraphs 15-24 and 28-31.

FOURTH DEFENSE

Defendants affirmatively aver that Plaintiff requested and/or acquiesced in the delay of his Career Service Commission hearing, thereby waiving any right to hearing at an earlier date.

FIFTH DEFENSE

Defendants affirmatively aver that all actions taken by them in regard to the Plaintiff were in good faith and pursuant to the laws of Florida and the rules and regulations of the Highway Patrol and

Department of Highway Safety and Motor Vehicles.

WHEREFORE, having fully answered the Amended Complaint, Defendants deny any liability to Plaintiff as a result thereof and pray that this action be dismissed.

Respectfully submitted,

JIM SMITH
Attorney General

/s/
PAMELA L. LUTTON
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
Suite 1501
The Capitol
Tallahassee, FL 32301
904 488-1573

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer has been furnished Ben R. Patterson, Esq., Attorney at Law, 1215 Thomasville Road, Tallahassee, FL 32303, by Mail, this 23rd day of September, 1980.

/s/
Pamela L. Lutton
Assistant Attorney General

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CASE NO. 79-0885

GREGORY SCOTT SCHERER,
et al.,
Plaintiffs,

vs.

ROBERT GRAHAM,
et al.,

Defendants.

PRE-TRIAL STIPULATION

COMES NOW the attorneys for the Plaintiff, Gregory Scott Scherer, and the attorneys for the Defendants, Ralph Davis, Chester Blakemore, in his official capacity as Director of the Florida Department of Highway Safety and Motor Vehicles, and Eldredge Beach, individually and as Director of the Florida Highway Patrol, Department of Highway Safety and Motor

Vehicles, the parties to this cause, pursuant to the Local Rules of this court, and stipulate as follows:

I.

Jurisdiction of this action is conferred upon the court by 28 U.S.C., §§1331 and 1343 (1970), and for actions brought under the Civil Rights Act of 1871, 42 U.S.C., §1983, hereinafter referred to as the Act.

II.

The Plaintiff, Gregory Scott Scherer, hereinafter referred to as the Plaintiff, is a former employee of the State of Florida Department of Highway Safety and Motor Vehicles. The Defendants are Ralph Davis, Chester Blakemore, and Eldredge Beach.

The nature of the action involves the entitlement of the Plaintiff to the

procedural protections of the Fifth, Ninth, and Fourteenth Amendments to the United States Constitution, insofar as it relates to his employment and whether that employment may have been impermissibly terminated as the result of his inherent right as a citizen to utilize his off-duty time in whatsoever way he desired, so long as the utilization of time did not conflict with his employment.

III.

A. Plaintiff makes the following contentions: (See Exhibit "A", attached hereto.)

B. Defendants make the following contentions: (See Exhibit "B", attached hereto.)

IV.

Plaintiff's list of trial exhibits is attached hereto as Exhibit "C". The Defendants' list of trial exhibits is attached hereto as Exhibit "D".

V.

Plaintiff's list of trial witnesses is attached hereto as Exhibit "E". Defendants' list of trial witnesses is attached hereto as Exhibit "F".

VI.

1. The Plaintiff was employed by the Florida Department of Highway Safety and Motor Vehicles, Division of Florida Highway Patrol, as a Radio-teletype Operator, on January 13, 1975.

2. His gross pay as of October 25, 1977, on a monthly basis, was seven hundred fifty-three dollars and thirty-three cents ($753.33).

3. During the months of September and October, 1977, the Executive Director of the Department of Highway Safety and Motor Vehicles was Ralph Davis.

4. Mr. Davis continued as Executive Director of the agency until _____ when he was succeeded by Mr. Chester Blakemore.

5. During the months of September and October, 1977, and continuing to the present, the Director of the Florida Highway Patrol (FHP) was and is Eldredge Beach.

6. The policy of the Department of Highway Safety and Motor Vehicles required Messers Beach and Davis to approve each and every suspension or dismissal of the employees of the FHP, including the dismissal of Mr. Scherer.

7. Mr. Beach and Mr. Davis approved the dismissal of the Plaintiff from his employment, effective October 25, 1977.

probationary period of employment, filed an appeal against dismissal with the Florida Career Service Commission on November 10, 1977.

20. On November 18, 1977, the Plaintiff was notified by Dorothy B. Roberts, Appeals Coordinator, that his appeal had been received and that the Department of Highway Safety and Motor Vehicles had been requested to provide certain information relative to his employment status to enable the Career Service Commissoin to determine the Plaintiff's appeal rights.

21. By letter dated December 8, 1977, signed by Miles T. Dean, from Conley M. Kennison, State Personnel Director, Mr. Scherer was notified that his appeal was in order and would be heard by the Career Service Commission.

22. On or about April 19, 1978, and pursuant to the Administrative Procedures

Act, the Plaintiff filed a petition for a rule challenge to Policy Number 009 of the Department.

23. On June 28, 1978, the challanged Policy Number 009 on the subject of dual employment and compensation was declared invalid because it had not been promulgated as a rule required by Florida Statute.

24. By letter dated July 13, 1978, signed by Dorothy B. Roberts, Appeals Coordinator for the Career Service Commission, the Plaintiff was notified that his appeal against dismissal would be herd by the Career Service Commission on August 4, 1978.

25. The Department of Highway Safety and Motor Vehicles did not appeal the invalidation of Policy Number 009 to the District Court of Appeal, and the determination that the Policy Number 009 was an invalid rule, as applied to Mr. Scherer, is final.

26. On July 24, 1978, the Department of Highway Safety and Motor Vehicles gave notice to the Plaintiff of additional reasons for the Plaintiff's dismissal of October 25, 1977.

27. On August 10, 1978, the Career Service Commission entered its order approving a stipulation and agreement between the Department of Highway Safety and Motor Vehicles and the Plaintiff, by which Plaintiff's dismissal was withdrawn, Plaintiff was credited with his sick and annual leave as if no dismissal had occurred, Plaintiff was awarded three thousand four hundred fifty dollars ($3,450) for back wages and was reinstated to his position of employment effective August 4, 1978.

28. Had Mr. Scherer continued in his employment with the Department of Highway Safety and Motor Vehicles from October 25,

1977, to August 4, 1978, he would have earned six thousand eight hundred sisteen dollars and fifty-one cents ($6,816.51).

29. By memorandum dated January 11, 1979, Plaintiff informed Defendant Beach that he wished to resign his position with the Highway Patrol effective January 13, 1979.

30. By memorandum dated January 12, 1979, Defendant Beach advised Plaintiff Scherer that he was relieved of duty January 10, 1979, pending an investigation; however, in view of Plaintiff's letter of January 11, 1979, Plaintiff's resignation was accepted effective January 13, 1979.

31. The Plaintiff's last day on the payroll of the Department of Highway Safety and Motor Vehicles was January 13, 1979. Plaintiff received all accrued leave.

32. As of January 13, 1979, the Plaintiff was making seven hundred seventy-

two dollars ($772) monthly. Plaintiff received all accrued leave.

33. Plaintiff did not administratively appeal the termination of his employment effective January 13, 1979.

34. Whether Plaintiff voluntarily ended his employment with the Florida Highway Patrol. [sic]

VII.

The following issues of law have been agreed upon by the parties:

1. The Plaintiff had permanent status within the Career Service System of the State of Florida under Chapter 110 of the Florida Statutes, and within the rules of the Career Service System of the State of Florida.

2. The Plaintiff had a property interest in his employment which was shielded by Fourteenth Amendment due process.

VIII.

Issues of fact which remain to be litigated are:

1. Whether the Plaintiff was employed following receipt of the letter of dismissal and, if so, the amounts earned.

2. Whether the Defendants acted reasonably and in good faith or maliciously, recklessly, with ill will or improper purpose.

3. Whether Captain Sconiers spoke to Plaintiff concerning Plaintiff's part-time employment and hours and informed Plaintiff that he did not think the Department would approve Plaintiff's request to work part-time with the Escambia County Sheriff's Office.

4. The dates and substance of conversations between Sgt. Clark and the Plaintiff concerning Plaintiff's working as a reserve deputy.

5. The dates and hours Plaintiff worked for the Escambia County Sheriff's Office during September and October, 1977.

6. Whether Defendant Beach recommended Plaintiff's firing without becoming informed of the facts surrounding his outside employment and attempts to comply with Departmental policy.

7. Whether the recommendation of Defendant Beach to fire Plaintiff was reasonable under the circumstances.

8. Whether Defendant Davis approved the dismissal of the Plaintiff without being informed of the facts of Plaintiff's outside employment or taking reasonable steps to become so informed.

9. Whether Defendant Beach acted reasonably in regard to all matters involving the Plaintiff after Plaintiff's reinstatement.

10. What occurred after Plaintiff's reinstatement on August 4, 1978.

11. What procedures were provided to the Plaintiff prior to termination, after termination, and after reinstatement.

12. What facts, if any, were in Defendants possession prior to Plaintiff's termination upon which the decision to terminate Plaintiff were based.

13. Whether Plaintiff requested and/or acquiesced in the delay in setting his hearing before the Career Service Commission.

14. Damages.

IX.

Issues of law which remain to be litigated are:

1. Whether the procedures afforded Plaintiff prior to termination, after termination, and after reinstatement were

sufficient to satisfy the requirements of the Fourteenth Amendment.

2. Whether the termination of Plaintiff's employment on January 10, 1979, was a constructive discharge.

3. Whether the Defendants' dismissal of the Plaintiff under the circumstances of this case invaded the Plaintiff's right to liberty and/or to privacy.

4. Whether the Defendants are entitled to a qualified good faith immunity defense; whether the Defendants are entitled to that defense under the objective prong of Wood; and whether the Defendants are entitled to that defense under the subjective prong.

5. Whether the Defendants' actions under the circumstances of this case may be legally characterized as reasonable or subjectively taken in good faith.

6. Plaintiff's entitlement to injunctive relief.

7. Plaintiff's entitlement to declaratory relief.

8. Plaintiff's entitlement to damages, including actual and exemplary damages.

9. Whether the back pay component of any award of damages should be mitigated or in any fashion diminished by interim earnings of Plaintiff.

10. Whether, under the facts known to the Defendants prior to Plaintiff's termination, Defendants arguably had the authority to adversely determine Plaintiff's employment status.

11. Whether Defendants Beach and/or Davis had any duty to become more informed of the facts of Plaintiff's outside employment prior to dismissing him.

12. Which party has the burden of proof concerning Defendants' good faith.

13. Whether Plaintiff waived his right to a prompt evidentiary hearing regarding his dismissal.

14. What effect the settlement entered in Plaintiff's case before the Career Service Commission has on this case.

15. Whether Plaintiff should have Pursued an administrative appeal of the January 13, 1979 termination of his employment and, if so, what effect his failure to do so has on this case.

X.

There is no disagreement between the parties as to the application of rules or evidence to the Federal Rules of Civil Procedure.

XI.

This is scheduled as a non-jury trial. Counsel estimate that trial of this matter will take two days.

Respectfully submitted,

JIM SMITH
Attorney General

reinstatement comported with the requirements of procedural process and did not violate Plaintiff's privacy or any other constitutional right.

Plaintiff could have contested the termination of his employment in January, 1979 by appealing to the Florida Career Service Commission. Plaintiff's failure to avail himself of that adequate administrative remedy prohibits him from litigating that question in this Court.

Defendants further contend that their actions as regard to Plaintiff were without malice and not contrary to a clearly established constitutional right of the Plaintiff. For Plaintiff to prevail, Plaintiff would have the burden of showing bad faith on Defendants' part.

EXHIBIT "B"

EXHIBIT "C"

Plaintiff's List of Documents for Trial

1. Policy No. 009 on the subject of dual employment and compensation, with an effective date of September 9, 1975, and signed by Ralph Davis.

2. General Order No. 43 of the Florida Highway Patrol, dated September 1, 1977, on the sugject of personnel rules and regulations--disciplinary action, appeals, grievances, and lost or stolen department-owned property policy.

3. Department of Highway Safety and Motor Vehicles, Personnel Rules and Regulations, §2, subject of disciplinary actions, grievances, and appeals, as approved by Conely M. Kennison, State Personnel Director, on or about July 19, 1977.

4. Correspondence dated August 21, 1975, from Conley M. Kenninson to Mr. Ralph Davis, with attachment.

5. Memorandum dated August 26, 1977, from G.S. Scherer to K.D. Sconiers.

6. Memorandum dated September 1, 1977, from K.D. Sconiers to G.S. Scherer.

7. Memorandum dated September 23, 1977, from K.D. Sconiers to G.S. Scherer.

8. Memorandum dated October 18 1977, from C.C. Wiggins to G.S. Scherer.

9. Teletype message, 0083 1024 1506 PANAl.

10. Letter dated October 24, 1977, from J.E. Beach, approved by Ralph Davis, to G.S. Scherer.

11. Letter dated November 10, 1977, from Ben Patterson to Conley Kennison.

12 Letter from Dorothy B. Roberts to Ben Patterson, dated November 18, 1977.

13. The personnel record of G.S. Scherer, as maintained by the Department of Highway Safety and Motor Vehicles, including the check-out sheet.

14. Letter dated October 18, 1977, from K.D. Sconiers to Colonel J.E. Beach.

15. Memorandum dated October 18, 1977, from C.C. Wiggins to K.D. Sconiers.

16. Memorandum dated August 18, 1977, from G.S. Scherer to K.D. Sconiers.

17. Memorandum dated October 12, 1977, from K.D. Sconiers to J.E. Beach.

18. Memorandum dated October 7, 1977, from W.A. Clark to K.D. Sconiers.

19. Memorandum dated October 4, 1977, from C.C. Wiggins to K.D. Sconiers.

20. Memorandum dated October 3, 1977, from W.A. Clark to K.D. Sconiers.

21. Letter dated July 13, 1978, from Dorothy B. Roberts to Ben R. Patterson and Edwin Strickland.

22. Letter dated August 10, 1978, from Dorothy B. Roberts to Enoch J. Whitney and Jerry G. Traynham.

23. All pleadings in a certain petition for a rule determination proceeding stuled [sic] Gregory Scott Scherer v. Department of Highway Safety and Motor Vehicles, Division of Florida Highway Patrol, Division of Administrative Hearings Case No. 78-750R.

24. All pleadings and documents contained in a Career Service Commission case styled In the Appeal of Gregory Scott Scherer Against Dismissal by the Department of Highway Safety and Motor Vehicles, Docket No. 77-292.

25. All pleadings and documents filed in the United States District Court, Northern District of Florida, Pensacola Division in Bankruptcy Case NO. 79-04151.

26. Memorandum dated November 24, 1975, from Jim Cox to the Divison of Directors on the subject of review of employee dismissal or suspension, to which is attached a form for review by Legal and Personnel of each suspension or termination.

27. Management guidelines for disciplinary actions submitted to Morris Helms from Jim Cox, with attachments dated October 14, 1977.

28. Personnel officers memorandum no. 77-225 on the subject of the right of management to assign duties and responsibilities to employees, sent to Morris Helms by Art Adams, and received on October 26, 1977, by the Department of Highway Safety and Motor Vehicles.

29. The pre-termination file of the Divison of Personnel of the Department of Highway Safety and Motor Vehicles, and all documents contained therein.

30. Minutes of the Division of Directors' meeting of January 5, 1975, reflecting receipt by the personnel section of the Department of Highway Safety and Motor Vehicles of January 17, 1975.

31. Minutes of the Division of Directors' meeting of July 28, 1975, concerning proposed revision of Department of Highway Safety and Motor Vehicles Policy No. 009 on the subject of dual employment.

32. Minutes of the Divison of Directors' meeting of August 11, 1975, approving Policy No. 009 on the subject of dual employment.

33. Minutes of the meeting of the Governor and the Cabinet approving Policy No. 009.

34. Minutes of meeting of November 24, 1975, approving the form to accompany drafts of orders or suspensions of [sic] dismissals.

35. Minutes of the meetings of December 27, 1976, which concerned dismissal and suspensions of over twenty-four (24) hours.

36. Minutes of the meeting of April 11, 1977, concerning guidelines for disciplinary actions.

37. Memorandum dated June 30, 1978, from John Whitney to Colonel Roger Coller, on the subject of Scherer v. DHSMV, DOAH Case No. 78-750R, which reflects carbon copies being sent to Defendants Davis and Beach.

38. Letter dated August 21, 1975, from Conley M. Kennison to Ralph Davis approving the policy of dual employment.

39. Department of Highway Safety and Motor Vehicles Division Directors' meeting minutes for March 5, 1973, subject of outside employment--conflict of interest.

40. Letter of December 7, 1976, from Ralph Davis to Mr. Edwin Frasier.

41. Letter of December 7, 1976, from Ralph Davis to Mr. J.P. Hall.

42. Memorandum dated September 21, 1977, to Directors Executive Staff and Maurice Helm, from Ralph Davis,

on the subject of "new members Career Service Commission".

43. Memorandum dated May 8, 1978, to Directors, Executive Staff, Mr. Helms, from Ralph Davis, telling all that Joseph Crevasse was appointed to the Career Service Commission.

44. Personnel file out card, indicating that it was not taken out until November 28, 1977, then by Maurice Helms.

45. Letter dated August 17, 1978, to Mr. E. Edward Cellon, from Maurice Helms, indicating that the Career Service Commission reinstated Scherer with $3,450.00 in back wages, and that had he continued to work or have been paid all back wages, it would come to $6,816.51.

46. Report of personnel action form, dated January 15, 1979, for Gregory S. Scherer.

47. Correspondence from Mr. Beach, dated January 12, 1979, to Gregory S. Scherer, reflecting a carbon copy to Captain Sconiers.

48. Teletype message from Beach to Scherer advising him that he was being relieved of duty, pending completion of investigation on destruction of radio equipment.

49. Memorandum to F.H.P. staff from J.E. Beach, dated November 18,

1975, on the subject of suspensions and informing staff to forward all suspensions to Legal and Personnel before submitting them to J.E. Beach.

50. Correspondence from J.E. Beach to First Sargeant W.R. Fox, on the subject of permission for civil action where Fox was given permission to retain an attorney to investigate a civil action, dated March 4, 1975.

DEFENDANTS' LIST OF DOCUMENTS

1. Memorandum dated September 1, 1977
   From: K.D. Sconiers
   To: G.S. Scherer
   Re: Part-time employment

2. Memorandum dated September 23, 1977
   From: K.D. Sconiers
   To: G.S. Scherer
   Re: Part-time employment

3. Memorandum dated October 3, 1977
   From: W.A. Clark
   To: K.D. Sconiers
   Re: Scherer's part-time employment

4. Memorandum dated October 4, 1977
   From: C.C. Wiggins
   To: K.D. Sconiers
   Re: G.S. Scherer

5. Memorandum dated October 7, 1977
   From: W.A. Clark
   To: K.D. Sconiers
   Re: Scherer's part-time employment

6. Memorandum dated October 12, 1977
   From: K.D. Sconiers
   To: Colonel J. E. Beach
   Re: Scherer's part-time employment

7. Memorandum dated October 18, 1977
   From: C.C. Wiggins
   To: G.S. Scherer
   Re: Outside employment

8. Memorandum dated October 18, 1977
   From: G.S. Scherer
   To: K.D. Sconiers
   Re: Outside employment

9. Memorandum dated October 18, 1977
   From: C.C. Wiggins
   To: K.D. Sconiers
   Re: G.S. Scherer

10. Memorandum dated October 18, 1977
    From: K.D. Sconiers
    To: Colonel J.E. Beach
    Re: Scherer's outside employment

11. Registered letter dated October 24, 1977
    From: Colonel J.E. Beach
    To: G.S. Scherer
    Re: Termination of Employment

12. Order approving Stipulation in Career Service Commission Case No. 77-292

13. Memorandum dated January 12, 1979
    From: Colonel J.E. Beach
    To: G.S. Scherer
    Re: Resignation

14. Escambia County Sheriff's Office payroll records pertaining to Plaintiff Scherer.

EXHIBIT "D"

EXHIBIT "E"

Plaintiff's List of Witnesses

1. J.E. Beach
2. K.D. Sconiers
3. C.C. Wiggins
4. W.A. Clark
5. E.D. Sapp
6. S.R. Bevis
7. Vince Selley
8. W.A. Hagerty
9. K.W. Wise
10. C.P. Anthony
11. C.W. Johnson
12. Ken Wise
13. Allen Chamberlin
14. Ray Stokes
15. Roy Scherer
16. The Plaintiff
17. The Plaintiff's wife
18. All witnesses listed by the Defendants
19. Rebuttal witnesses as needed.

3. Messers Sapp and Bevis were, during the summer and fall of 1977, employed as security personnel on the Universal Studio's set in Santa Rosa County, in addition to their regular employment with the Department of Highway Safety and Motor Vehicles.

4. At that time, they and Mr. Scherer were subject to Policy No. 009, Dual Employment and Compensation, of the Department of Highway Safety and Motor Vehicles.

5. They and Mr. Scherer requested authorization to work on a secondary job.

6. They and Mr. Scherer received initial approval of that secondary employment.

7. Unlike Mr. Scherer, the initial approval of that second employment which they received was never revoked.

8. They did not wear their Highway Patrol uniforms at their secondary employment.

/s/
Ben R. Patterson

PATTERSON & TRAYNHAM
P.O. Box 4289
1215 Thomasville Road
Tallahassee, Florida 32303
(904) 224-9181

Attorney for Plaintiff

/s/
Pamela L. Lutton
Assistant Attorney General
Department of Legal affairs
Suite 1501, The Capitol
Tallahassee, Florida 32303
(904) 488-1573

Attorney for Defendants

SUPREME COURT OF THE UNITED STATES

No. 83-490

Ralph Davis, etc., et al.,

Appellants,

v.

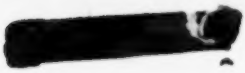
Gregory Scott Scherer

APPEAL from the United States Court of Appeals for the Eleventh Circuit.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

December 12, 1983

83-490



Office-Supreme Court, U.S.
FILED
OCT 21 1983
ALEXANDER L. STEVAS,
CLERK

Case No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

RALPH DAVIS, individually, CHESTER BLAKEMORE, officially as the Director of the Department of Highway Safety and Motor Vehicles; and J. ELDREDGE BEACH, individually and as Director of the Florida Highway Patrol, Department of Highway Safety and Motor Vehicles, Appellants,

v.

GREGORY SCOTT SCHERER, Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

BEN R. PATTERSON, ESQ.

Patterson & Traynham
Attorneys at Law
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Tallahassee, Florida 32315
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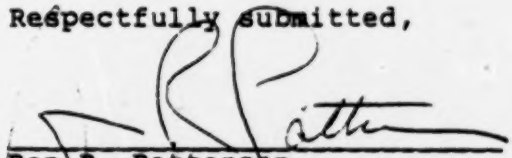
Counsel for Appellees

MOTION TO DISMISS OR AFFIRM

Appellee in the above-entitled case moves this Court to dismiss or affirm this Appeal under Rule 16.1C of the Rules of this Court, on the grounds that the federal questions raised do not present substantial federal questions, or that the decision is a correct one primarily based on findings of fact in an individual case made by the trial court and accepted by the Circuit Court of Appeals.

Respectfully submitted,



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Attorney for Appellee

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III.

PROCEEDINGS BELOW AND THE FACTS

The Plaintiff below, the Appellee here, Gregory S. Scherer, was employed as a Radio-Teletype Operator with the State of Florida Department of Highway Safety and Motor Vehicles, Division of Florida Highway Patrol, Troop A, as of January 13, 1975.

On August 26, 1977, he requested approval of his Troop Commander, Capt. K.S. Sconiers, to work as an Escambia County Sheriff's Reserve Deputy. On September 1, 1977, Capt. Sconiers notified the Plaintiff/Appellee that he had permission to accept part-time employment as an Escambia County Sheriff's Reserve Deputy. Relying on this letter of approval, he purchased a uniform and a

pistol and was employed part-time as an Escambia County Sheriff's Reserve Deputy, assigned with other such officers to guard the set of the movie "Jaws II".

On September 23, 1977, Capt. Sconiers informed the Plaintiff/Appellee " . . . the Department feels that it would be of the best interest to our Department for you not to accept this employment; therefore, your request . . . is denied at this time."

Troopers E.D. Sapp and S.R. Bevis of Troop A (Sconiers' Troop) also requested authorization to work secondary employment as security personnel on the Universal Studio set in Santa Rosa County. They received approval which was never revoked.

In October, 1977, Mr. Scherer was requested to resign his work as a Reserve Deputy. Since he was never informed of

any conflict between his employment as a security person on the Jaws II set, and his immediate superiors testified at trial they knew of no conflict, he declined to do so. Capt. Sconiers, on October 12, 1977, wrote to the Defendant, J.E. Beach, and recommended that Mr. Scherer be suspended for three days for violation of the Department's dual employment policy.

By certified letter dated October 24, 1977, and received by Plaintiff/Appellee on October 25, 1977, Scherer was terminated from his FHP employment, effective October 20, 1977. At no time prior to the letter of termination was the Plaintiff/Appellee given notice in writing of a proposed discharge or an opportunity to respond verbally or in writing to the officials charged with making the termination decision, the Defendant Beach

and Defendant Davis.

The trial court found that there was no evidence of any affidavit or statement given or made to Defendants Beach or Davis which showed or purported to show that the Plaintiff's/Appellee's outside employment conflicted in any manner with his duties as a Radio-Teletype Operator for the Florida Department of Highway Safety and Motor Vehicles, Division of Florida Highway Patrol. The choice to dismiss, rather than suspend Scherer, was in violation of the Department's own disciplinary guidelines.

On November 10, 1977, the Plaintiff/Appellee, pursuant to Florida statutory scheme providing for a hearing on dismissal for Career Service employees, filed an appeal against his dismissal with the Florida Career Service Commission,

claiming he had been dismissed without just cause because his dismissal was pursuant to a rule not validly adopted by the Department. By letter dated July 13, 1978, the Plaintiff/Appellee was notified that his appeal against dismissal would be heard by the Career Service Commission on August 4, 1978. On August 10, 1978, the Career Service Commission entered its order approving a stipulation and agreement between the Department of Highway Safety and Motor Vehicles and the Plaintiff/Appellee which reinstated the Plaintiff/Appellee to his position of employment, and afforded him partial back pay.

Thereafter, the Plaintiff/Appellee, Gregory Scherer, filed an action premised on the denial of due process in the United States District Court for the Northern

District of Florida. He sought damages for his emotional distress, and a declaratory judgment that the statute and its implementing rules and regulations were unconstitutional since they did not provide for a meaningful hearing at a meaningful time.

The Appeals Coordinator of the Career Service Commission, Dorothy B. Roberts, testified that she had been so employed for a period of ten (10) years. She provided from statistical reports of that agency the average time between acceptance of appeal and date of hearing as follows:

Month	Average Time Between Acceptance of Appeal and Date of Hearing
July, 1978	185.909 days
August, 1978	205.27 days
September, 1978	314.15 days
October, 1978	162.3 days

November, 1978	180.1 days
December, 1978	357.00 days
January, 1979	266.8 days
February, 1979	258.83 days

She also stated that the Career Service Commission took an additional period of time following the hearing to file their written order. Her testimony was that if the written order reversed the agency's action, and ordered a discharged employee reinstated, the reinstatement would not be automatic and the agency could appeal the action to the District Court of Appeal. During the pendency of that appeal, the order of the Career Service Commission would be stayed.

Testimony was adduced from C.W. Johnson, President of the Florida Highway Patrol Charter of the Florida Police Benevolent Association, that the appeal of

a Marcus McGowan, which was heard in November, 1978, by the Career Service Commission (CSC), and which was appealed by the Department of Highway Safety and Motor Vehicles to the District Court of Appeal following reversal by the CSC of the agency's decision to discharge McGowan, was still pending in the Court of Appeals as of the date of the trial, April, 1981, and Mr. McGowan had not been returned to his employment with the Department of Highway Safety and Motor Vehicles.

An award of back pay, if the Career Service Commission did not find just cause, was not guaranteed according to Mrs. Roberts. Case law is supportive of that fact.

After trial, judgment was entered in favor of the Plaintiff/Appellee, Gregory

S. Scherer, in the sum of Four Thousand Two Hundred Dollars ($4,200.00). The court determined initially that the Defendants were not entitled to the qualified good faith immunity because the law was settled by Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972); Arnett v. Kennedy, 416 U.S. 134 (1974); and Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1976). It also found that the dismissal decision of Beach and Davis violated the Department's own disciplinary guidelines, and, in an amended judgment, found that the Defendants violated the Florida Highway Patrol General Order No. 43.

The Defendants/Appellants Davis and Beach, appealed to the United States Circuit Court of the Eleventh Circuit. The Circuit Court of Appeals affirmed the

judgment on June 30, 1983, and denied the petition for panel rehearing on August 23, 1983.

The Defendants/Appellants filed a notice of appeal to this Court on or about August 31, 1983, and filed their jurisdictional statement with this Court on September 21, 1983.

In their jurisdictional statement, the Defendants/Appellants contend that the courts below erred in determining that Chapter 110, Florida Statutes (1981), and its implementing rules, are unconstitutional insofar as they fail to provide a prompt post-termination hearing since the statute was amended after the dismissal of the Plaintiff/Appellee. Engrafted upon this appeal is the question of the Defendants'/Appellants' entitlement to good faith immunity even if they did

violate the Plaintiff's/Appellee's rights under their own rules and regulations.

IV.

ARGUMENT

A. Summary of the Argument

The Plaintiff/Appellee sought damages and a declaratory judgment. The facts demonstrated the unconstitutionality of the statute and its implementing rules, insofar as they fail to provide a prompt post-termination hearing. Any defense that the Defendants may have as to mootness in the light of a post-termination amendment to the statute was waived by the failure of the Defendants/Appellants to present to the trial court and the appellate court below their argument that the 1981 law mooted

Plaintiff's/Appellee's claim, and, because in their footnote 13 of their initial brief to the appellate court below, they waived any such argument, and because the evidence clearly demonstrated the failure of the statute and its implementing rules to provide for a post-termination hearing at a meaningful time, the court's declaratory judgment was correct and the decision of the court below should be affirmed.

The Defendants'/Appellants' violation of state law, as found by the court below, is either a sufficient objective violation to preclude them from utilizing the good faith immunity defense, or it shows that they were acting outside their discretionary authority and that they were, for that reason, not entitled to good faith immunity.

In the alternative, the Defendants'/Appellants' invocation of this Court's jurisdiction under 28 U.S.C., Section 1254(2), acts to deny the Defendants'/Appellants' their opportunity to raise the question of the application of the good faith immunity doctrine.

This Court should summarily affirm the decision of the court below, as judgment is correct.

B. The Defendants'/Appellants' Failure to Present the Questions Raised Here to Either the Trial Court or the Appellate Court Bars Consideration of Those Issues by This Court

The trial court, in its judgment, stated in the context of this damage action that Chapter 110, Florida Statutes (1981), and its implementing rules, were unconstitutional insofar as they fail to provide a prompt post-termination hearing.

The Defendants, in their jurisdictional statement to this Court, have stated that:

> The statute which the District Court found unconstitutional, Chapter 110, Florida Statutes (1981), had not even been promulgated, let alone applied at the time of Appellee's termination in 1977. Thus no live dispute as to the statute's constitutionality existed, and this issue was not justiciable.

This contention is raised for the first time before this Court. Indeed, in footnote 13 of their brief to the United States Court of Appeals for the Eleventh Circuit, the Defendants said the statute under which Mr. Scherer was discharged had substantially the same wording as Chapter 110, Fla. Stat. (1981).

> 13. A memorandum opinion and order were entered in this case on July 15, 1981. (ROA, pp. 535-560). This order declared Section 110.061, Fla. Stat. (1977), unconstitutional because of

its failure to provide a prompt post-termination hearing, as well as declaring it unconstitutional on other grounds. The District Court receded from other grounds in its Order Amending Judgment. Section 110.061(2)(c), Fla. Stat. (1977), the section dealing with hearing rights, states: "an employee who is dismissed shall be entitled to a de novo fact finding hearing pursuant to subsection 120.57(1)." As the District Court noted in its order amending judgment, entered on June 7, 1982 (ROA, pp. 638-645), the Legislature repealed Section 110.061 in 1979. The Order Amending Judgment addressed Chapter 110, Fla. Stat. (1981) generally in regard to the post-termination hearing requirement even though Section 110.061 was the statute in effect at the time of Plaintiff's termination. Defendants' argument is addressed to the constitutionality of both sections since the wording is substantially the same.

(Emphasis added.)

Thus, the Defendants/Appellants waived any objection that they may have had based on a later-adopted statute which, if the language were different, would support their mootness argument.

Furthermore, the evidence presented demonstrated the inadequacy of the procedures available.

The Plaintiff/Appellee did not receive notice of his dismissal until after the date of his dismissal. He had to wait ten (10) months for his hearing. The Appeals Coordinator testified that the average time from date of appeal to date of hearing ranged from a low of six months to approximately one year. She also testified that following the hearing, the Commission took additional time to draft its order and if the employee was ordered reinstated by the Career Service

Commission, that order would be stayed in the event that the agency appealed from it. With the admission by the Defendants/Appellants that the wording of "both sections . . . is substantially the same", the court had no reason not to reach the constitutionality of Chapter 110 and its implementing rules and regulations for their failure to provide a prompt post-termination hearing.

The argument that Mr. Scherer had no "personal stake in the resolution" of this issue is contrary to the facts of this case. The cases cited by the Defendants/Appellants, Golden v. Zwickler, 394 U.S. 103 (1969); O'Shea v. Littleton, 414 U.S. 488 (1974); and Murphy v. Hunt, 455 U.S. 478 (1982), are inapposite. Those cases involved requests for declaratory and injunctive relief only.

In the instant case, Mr. Scherer sought and obtained damages. His dispute is alive today for his judgment remains unsatisfied.

The Defendants state a further reason to this Court that the declaratory relief ordered below is inappropriate. They state that a court must interpret a statute so as to render it constitutional, if at all possible. In light of the evidence presented here, though, the time lag between the termination date, the hearing, and reinstatement, support the determination, in the context of this litigation, that:

> Chapter 110, Florida Statutes (1981) and its implementing rules are unconstitutional insofar as they fail to provide a prompt post-termination hearing.

Because the Defendants/Appellants failed to present to the trial court and

the appellate court below their argument that the 1981 law mooted Plaintiff's claim, and, because in their footnote 13 of their initial brief to the appellate court below they waived any such argument, and because the dispute herein was alive at all times, and is alive now, Plaintiff/Appellee is entitled to an affirmance from this Court of the judgment below, pursuant to Rule 16.1C.

C. The Defendants' Violation of State Law Abrogates the Defense of Good Faith Immunity of the Defendants, Even If the Defendants' Failure to Provide Due Process to the Plaintiff Did Not Violate Clearly Established Federal Constitutional Law

The Plaintiff/Appellee disputes the contention of the Defendants that the conduct of the Defendants/Appellants did not violate clearly established federal constitutional law.

In Board of Regents v. Roth, 408 U.S. 564 (1972), this Court held that an employee with an objective expectancy to continued employment was entitled to a hearing on the issue of his discharge. In Armstrong v. Manzo, 380 U.S. 306 (1950), the Court held that the opportunity to be heard should be granted at a meaningful time and in a manner which is appropriate to the nature of the situation.

The trial court determined that the ten (10) months, which Mr. Scherer had to wait, was not a hearing granted at a meaningful time. The evidence presented by the Appeals Coordinator was to the effect that a hearing would not normally be held on an appeal until six (6) months to a year after the appeal had been lodged. For an employee dependent for survival on his wages to wait such an

extreme period of time before any hearing is granted is wholly inappropriate. It is, therefore, Mr. Scherer's contention that the Defendants' actions in denying him due process violated the settled law that flows from the decisions of this Court.

In denying him the process to which he was due, the Defendants/Appellants also violated their own rules. In this appeal, the Defendants/Appellants contend that a violation of state law, rules and regulations, should not preclude them from the protection of the good faith immunity defense. In so arguing, they interpret Harlow v. Fitzgerald, ___ U.S. ___, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982), narrowly. They broadly state that the objective test as to the application of good faith immunity rests:

> . . . solely in terms of whether the constitutional law was clearly established at the time of the conduct in question. See, Crowder v. Lash, 687 F.2d 996 (7th Cir. 1982); Clanton v. Orleans Parrish School Board, 649 F.2d 1084 (5th Cir. 1981); Jihaad v. O'Brien, 645 F.2d 556 (6th Cir. 1981); Jackson v. State of Mississippi, 644 F.2d 1142 (5th Cir. 1981). To consider agency regulations or state law is to contravene those decisions.

None of the cases cited by Defendants/Appellants involve a violation of any regulations or any allegation of any statutory or regulatory violation. In none of the cases cited was any evidence adduced as to any violation of state law, rules, or regulations. The cases cited were not parallel to the instant matter.

The Defendants' argument is a strained interpretation of Harlow. The Defendants/Appellants overlook the conjunction used by the Harlow court to

describe the objective component of the good faith immunity defense as violations of the "statutory and constitutional law".

Furthermore, the Defendants completely overlooked the language of this Court in Smith v. Wade, ___ U.S. ___, 5 U.S.L.W. 4407, 4414 (1983), in which the Court said that the official:

> . . .is protected from liability for mere negligence because of the need to protect his use of discretion in day-to-day decisions in the running of a correctional facility. See generally, Procunier v. Navarette, 434 U.S. 555 (1978); Wood v. Strickland, 420 U.S. 308 (1975). But the immunity on which Smith relies is co-extensive with the interest it protects. The very fact that the privilege is qualified reflects a recognition there is no societal interest in protecting those uses of a prison guard's discretion that amount to reckless and callous indifference to the rights and safety of the prisoners in his charge. Once the protected sphere of privilege is exceeded, we see no reason why state

> officers should not be liable for their reckless misconduct on the same basis as private tort feasors.

Here, a violation of the state rules and regulations was found. These Defendant state officers have exceeded their sphere of discretion. The immunity defense did not apply, and the courts below properly found that it did not apply.

The argument that other courts considering the objective component of good faith immunity have never looked to a violation of state rules, regulations, and statutes, ignores Williams v. Treen, 671 F.2d 892, 901 (5th Cir. 1982), and King v. Higgins, 702 F.2d 18, 21 (1st Cir. 1983).

Furthermore, the violation of statutes, rules and regulations demonstrates that these Defendants violated "the protected sphere of

privilege". Smith v. Wade, supra. A violation of this discretion denies them a right to the good faith immunity defense. Williams v. Treen, supra.

> If an official's conduct contravenes his own state's explicit and clearly established regulations, a subjective belief in the lawfulness of his action is per se unreasonable. We therefore find that insofar as the conditions of confinement at Angola contravened clearly established state law, a responsible official's belief in the lawfulness of those conditions was per se unreasonable and the defendants are not entitled to claim an immunity based on reasonable good faith. To hold otherwise would be to encourage official ignorance of the law.

Id. at 901. See also, Clark v. Taylor, 710 F.2d 4 (1st Cir. 1983); and Gagnon v. Ball, 696 F.2d 17, 19 n.3 (2d Cir. 1982).

In short, the court found that these Defendants violated their own rules, and in doing so violated the constitutional

rights of the Plaintiff/Appellee. They are not entitled to the benefits of the good faith immunity defense, for they either were not acting within their discretionary authority in taking the action that they did take against Mr. Scherer, or their violation of the rules of their own department is a sufficient objective violation to preclude them from utilizing the good faith immunity defense.

D. The Invocation of this Court's Jurisdiction Under 28 U.S.C., Section 1254, Acts to Deny the Defendants/Appellants Their Opportunity to Raise the Question of the Application of the Good Faith Immunity Doctrine

Section 1254(2) limits this Court's review "to the federal questions presented." The phrase, "the federal questions presented", should restrict the Court's review to the federal questions

presented by the invalidation of the state's statute and its implementing rules anad regulations, and not to all other federal questions that may be in this particular case. Professor Moore, in 12 Moore's Federal Practice, paragraph 435.01(2), says that:

> A narrow reading of the statute, which limits the court's review to consideration of the invalidation issue, would comport with the principle that statutes defining the court's obligatory jurisdiction should be read narrowly. In addition, if a party desires review of all the federal questions in the case, he may forego an appeal under Section 1254(2), and seek certiorari under Section 1254(1). The authors submit that the arguments in favor of a narrow reading of the statute are more cogent; and, therefore, that an appeal brought under Section 1254(2) should present for review only the question of the invalidation of the state's statute.

The Plaintiff/Appellee Scherer respectfully requests this Court to deny

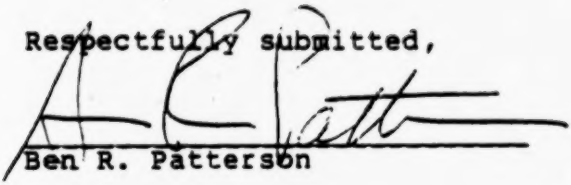
review of any question as to the application of the doctrine of good faith immunity, and to dismiss the appeal insofar as it seeks to have this Court review the good faith immunity issue.

V.

CONCLUSION

The questions raised on appeal here are so unsubstantial as not to need further argument. The judgment entered below was correct. The Plaintiff/Appellee respectfully requests this Court to affirm the judgment sought to be reviewed.

Respectfully submitted,



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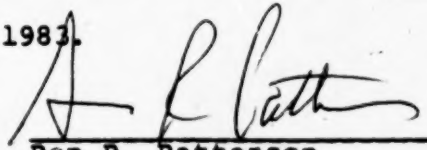

Ben R. Patterson

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Case No. 83-490

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

RALPH DAVIS, individually, CHESTER BLAKEMORE, officially as the Director of the Department of Highway Safety and Motor Vehicles; and J. ELDREDGE BEACH, individually and as Director of the Florida Highway Patrol, Department of Highway Safety and Motor Vehicles,

Appellants,

v.

GREGORY SCOTT SCHERER,

Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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INTRODUCTION

Three erroneous assumptions which misstate either the applicable law, the facts, or both form the basis of Appellee's Motion to Dismiss or Affirm. Appellants' response to these three points of error are made in the order they were raised in Appellee's Motion.

1. Appellants' Mootness Argument Was Presented to Both the Trial Court and the Appellate Court.

Appellee's assertion that Appellants' have not raised the issue of mootness (see Appellants' Jurisdictional Statement, pp. 13-16) prior to their brief in this Court, is wrong. Such argument was presented to both the trial court and to the appellate court. The issue was raised in the trial court via Defendants' Motion to Alter Judgment. As a result of such motion, the trial court receded from its original Memorandum and Opinion Order (see,

Appellants' Appendix to Jurisdictional Statement, hereinafter "Appendix", pp. la-55a) and found that declaratory relief was inappropriate because certain statutory deficiences had been corrected. The trial court did not, however, correct its ruling on the post-termination issue.

Thereafter, Appellants again raised the mootness issue in their brief to the Eleventh Circuit Court of Appeals. See, Brief of Appellants, United States Court of Appeals, Eleventh Circuit, pp. 33-39. Appellee tacitly recognizes this in his quotation of footnote 13 of Appellants' Eleventh Circuit brief.

Further, Appellee's argument that Appellants have somehow waived their entitlement to address the mootness issue here because they previously noted the similar wording of the two statutes in question in a footnote is without merit.

This Court must look to the statute in effect at the time of Appellee's termination. Because that statute is undisputedly no longer in effect, any argument as to its constitutionality or applicability is moot, and the trial court's declaratory judgment as to that later-enacted statute is clear error.

Further, contrary to Appellee's assertion, the evidence did not demonstrate that the length of time which elapsed between Appellee's discharge and his hearing was constitutionally infirm. Time periods longer than or close to that experienced by Appellee have been found constitutional. See, Thompson v. Bass, 616 F.2d 1259 (5th Cir. 1980), cert. den., 449 U.S. 983 (1980); Ciechon v. City of Chicago, 634 F.2d 1055 (7th Cir. 1980); Alsbury v. United States Post Office, 530 F.2d 852 (9th Cir. 1976), cert. den., 429

U.S. 828 (1977); Blackford v. Maryland Automobile Insurance Fund, 532 F.Supp. 24 D. Md. 1981).

2. Appellants Have Correctly Interpreted Harlow v. Fitzgerald.

Appellee argues that Appellants' interpretation of Harlow v. Fitzgerald, ___ U.S. ___, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) is "narrow" or "strained". However, Harlow clearly states that the objective test to be utilized in determining good faith immunity is framed solely in terms of whether clearly established constitutional law has been violated. Harlow, ___ U.S. ___, 102 S.Ct. 2727, 73 L.Ed.2d at 410-411.

It is true that the lower court cases Appellants cite do not revolve around a violation of state law or mere agency rule. That is because the courts looked only to see if clearly established

constitutional law had been violated. That determination alone resulted in the granting or denial of good faith immunity, since that is the standard established by this Court.

Appellee cites Smith v. Wade, ___ U.S. ___, 51 U.S.L.W. 4407 (April 20, 1983), in support of his expansive interpretation of Harlow. Smith v. Wade involved the harrassment, beating, and sexual assault of a youthful offender by other inmates. The legal issue there was whether punitive damages were appropriately assessed under 42 U.S.C. §1983. This Court held that punitive damages could be assessed "when the defendant's conduct is shown to be motivated by evil motive or intent or when it involves reckless or callous indifference to the federally protected rights of others." ___ U.S. ___, 51 U.S.L.W. at 4414.

Smith v. Wade is clearly inapposite to the instant case. There was no factual finding of evil intent or reckless conduct here which might arguably abrogate immunity. Similarly, Clark v. Taylor, 710 F.2d 4 (1st Cir. 1983), citing Smith v. Wade, relies upon a finding of reckless and callous indifference. Here, the trial court explicitly declined to award punitive damages stating:

> These damages should not be considered PUNITIVE damages, which would have been awarded if the defendants' actions demonstrated malicious intention.

Appendix, p. 54a.

Even if Appellants exceeded their sphere of administrative discretion, which Appellants insist they did not,[1] this is not

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[1] Appellee states twice in his Motion (pp. 4, 9) that Appellants violated their disciplinary guidelines. However, this is a blantant misstatement. The trial court's Order Amending Judgment states: "The (cont'd on next page)

equivalent to reckless misconduct, nor is it sufficient to abrogate immunity.

Williams v. Treen, 671 F.2d 892 (5th Cir. 1982), cert. den., 103 S.Ct. 762 (1983), also relied upon by Appellee to support his interpretation of Harlow, found that a violation of state law abrogated good faith immunity. However, the state law violated, which dealt with prison conditions, was the same as the federal constitutional right prohibiting such conditions. And even the Williams court recognized that "a §1983 plaintiff must allege a deprivation of a federally protected right in order to set forth a prima facie case . . . ." Williams at 900. The same is true in King v. Higgins, 702 F.2d 18 (1st Cir. 1983), where the

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conclusion defendants violated departmental guidelines is not supported by the evidence . . . ." Appendix, p. 72a.

court noted that the basic standards of due process had long been established under federal law.

Thus, Appellants' reading of Harlow to require a violation of federal constitutional law before good faith immunity is abrogated is unchanged by the cases upon which Appellee relies. None of those cases change or modify this Court's opinion in Harlow, and even to the extent they do, Harlow must prevail.

3. This Court Has Jurisdiction to Consider the Good Faith Immunity Issue.

The jurisdiction of this Court on appeal may be narrow, but it is not as narrow as Appellee suggests. The applicable language found in 28 U.S.C. §1254(2) states that appeals may be reviewed by the Court:

> by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitutional, treaties, or laws

> of the United States, . . . and the review on appeal shall be restricted to the Federal questions presented. (Emphasis added).

The plain language of the statute permits appeals of "Federal questions." There can be no doubt that the issue of good faith immunity is a federal question. Thus, jurisdiction has been properly invoked.

CONCLUSION

The reasons for this Court to note probable jurisdiction, delinated in Appellants' Jurisdictional Statement, have not been rebutted by Appellee. Therefore, this Court should note probable jurisdiction of this appeal.

Respectfully submitted

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I HEREBY CERTIFY that a true and correct copy of the foregoing Brief in Opposition to Motion to Dismiss or Affirm has been furnished by United States Mail to BEN R. PATTERSON, Counsel for Appellee, 1215 Thomasville Road, Post Office Box 4289, Tallahassee, Florida 32303, this 31st day of October, 1983.

Bruce A. Minnick

BRUCE A. MINNICK

Supreme Court, U.S.
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CLERK

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BRIEF FOR THE APPELLANTS

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QUESTIONS PRESENTED

1. Whether the provisions of Chapter 110, Florida Statutes (1981), and its implementing rules, which relate to post-termination hearings for state employees, are unconstitutional.

2. Whether the violation of agency regulation or state law abrogates the defense of good faith immunity when the conduct in question does not violate clearly established federal constitutional law.

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§22M-2.08, F.A.C. 4

OPINIONS BELOW

The original Memorandum Opinion and Order of the United States District Court for the Northern District of Florida (1a-56a[1]) is reported at 543 F.Supp. 4 (N.D. Fla. 1981). The Order Amending Judgment (62a-78a) is not reported.

The Rule 25 affirmance of the Court of Appeals for the Eleventh Circuit (83a-84a) is not reported. The denial of Appellants' Petition for Panel Rehearing by the Court of Appeals for the Eleventh Circuit (85a-86a) is not reported.

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[1]References to the appendix to Appellants' Jurisdictional Statement are denoted "a". References to the Joint Appendix are denoted "JA". References to the transcript of the trial in the district court are denoted "T". References to the record in the United States Supreme Court are denoted "R".

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit (83a-84a) was entered on June 30, 1983. A Petition for Panel Rehearing was denied on August 22, 1983. (85a-86a).

A Notice of Appeal to the United States Supreme Court was filed in the Court of Appeals for the Eleventh Circuit (87a-88a) on September 2, 1983.

The Jurisdictional Statement was docketed in this Court on September 21, 1983. Probable jurisdiction was noted on December 12, 1983. (JA 67). The jurisdiction of this Court rests upon 28 U.S.C. §1254(2).

STATUTES AND REGULATIONS

Section 110.309, Florida Statutes (1981):

110.309 Procedure with respect to suspensions and dismissals.-

(1) A permanent employee in the State Career Service System who is suspended or dismissed by an agency or officer shall be entitled to a de novo fact-finding hearing. Such hearing shall be conducted by the commission itself, unless otherwise provided by law.

(2) Upon a finding that just cause existed for the suspension or dismissal, the commission shall affirm the suspension or dismissal.

(3) Upon a finding that just cause did not exist for the suspension or dismissal, the commission may order the reinstatement of the employee, with or without back pay.

(4) Upon a finding that just cause for disciplinary action existed, but did not justify the severity of the action taken, the commission may, in its discretion:

(a) Reduce a dismissal to a suspension for such time as the commission may fix; or

(b) Reduce the period of a suspension.

(5) Any order of the commission issued pursuant to subsection (3) or subsection (4) shall be conclusive on the agency or officer concerned. The order may include an amount, to be determined by the commission and paid

by the agency, for reasonable attorney's fees, witness fees, and other out-of-pocket expenses incurred during the prosecution of an appeal against an agency in which the commission sustains the employee.

Section 22M-2.08, F.A.C.:

22M-2.08 Setting Appeal for Hearing.

(1) Either party may file a motion showing that discovery is complete and that an appeal is ready to be set for hearing. Upon the filing by either party of a motion to set an appeal for hearing, the appeal shall be set on the hearing docket within 30 days. The Commission shall hear all appeals as scheduled on the docket within a geographic area, as the Commission's travel schedule permits. The Commission reserves the right, within the group of hearings set for given dates, to hear cases out of docket order, to make the best use of its available hearing time.

(2) Time for appeal hearings shall be allotted to appeals according to the circumstances of each particular appeal.

(3) Unless otherwise stipulated by the parties, at least fourteen days' notice of the hearing shall be given.

(4) An appeal hearing may be held without the presence of the appealing party upon proof of notice of hearing having been properly given to the appellant. A default shall not be entered in any appeal and the agency

shall be required to present a prima facie case in support of the allegations upon which the agency action was taken.

(5) Except in instances where good cause is shown, motions for continuance must be filed not later than five calendar days after receipt of notice of the hearing, and shall be granted solely in the discretion of the Commission or its presiding officer. Motions for continuance will be granted only in cases of extreme emergency.

STATEMENT OF THE CASE

Gregory Scott Scherer, Appellee, was employed in January, 1975, as a radio-teletype operator with the Florida Highway Patrol ("FHP"), a division of the State of Florida Department of Highway Safety and Motor Vehicles ("DHSMV"). (R. 536). The Appellants, Ralph Davis, Chester Blakemore, and J. Eldredge Beach, were respectively, the Executive Director of the DHSMV until September 30, 1978, Davis' successor, and the Director of the FHP. (R. 536).

In August, 1977, Appellee became an auxiliary deputy with the Escambia County Sheriff's Office. (T. vol. I, p. 73). DHSMV Policy Number 009 required Appellee to obtain permission for such secondary employment. (R. 537). Appellee requested permission and a letter granting permission was prepared and signed by Appellee's Captain. (T, vol. II, pp. 53, 61).

The Captain subsequently determined that a conflict could arise from holding two law enforcement positions, and he instructed his secretary not to mail the letter granting approval. (T, vol. II, pp. 46-47, 53, 61). Several days later, the Captain learned that the approval letter had been mailed inadvertently. (T, vol. II, pp. 46-47, 53, 61-62).

A decision was then made to disallow Appellee's request for secondary employment. (T, vol. I, p. 215; vol. II, p. 47). Appellee was notified orally by his supervisors as to their decision, (T, vol. I, pp. 222-231), and as to why his request had been disapproved. (T, vol. I, p. 76; vol. II, p. 105). Appellee was also informed in writing of the denial of his request. (R. 537).

Despite the denial of his request for dual employment, Appellee continued to work

as an auxiliary deputy. (T, vol. II, p. 66). The problem of Appellee's dual employment was discussed with him, and he was informed of the consequences of his actions. (T, vol. II, p. 48). Appellee was then ordered to terminate his employment as an auxiliary deputy, and Appellee responded in writing that he would not do so. (R. 538). By certified letter dated October 24, 1977, Appellee was terminated from his position with the FHP. (R. 538).

Appellee appealed his termination to the Florida Career Service Commission. (R. 539). On August 10, 1978 (JA 39), prior to the scheduled hearing before the Commission, Appellee's attorney, with the full knowledge and approval of Appellee, negotiated a settlement of his case. The settlement provided for back pay, reinstatement and other benefits. (T, vol.

I, pp 94-97, 131-132). Subsequently, on January 13, 1979 (JA 40), Appellee voluntarily resigned from his position pending an investigation of allegations of radio tampering. (T, vol. I, pp. 116, 198-201).

On September 1, 1979, Appellee filed an Amended Complaint in the United States District Court for the Northern District of Florida. (JA 6-23). The Amended Complaint alleged a denial of procedural due process and a denial of the First and Ninth Amendment right of privacy arising from Appellee's termination.

The case was tried before the Honorable Judge William Stafford, and a Memorandum Opinion and Order (1a-55a) was entered, which held, in pertinent part, that section 110.061, Florida Statutes (1977), was unconstitutional because it did not provide pre-termination procedures, a prompt post-

termination hearing and back pay to a prevailing employee. The Memorandum Opinion and Order further found that Appellants Ralph Davis and J. Eldredge Beach were not entitled to the defense of good faith immunity because the law on pre-termination due process was settled at the time of their actions.

Subsequently, the district court entered an Order Amending Judgment (62a-78a) due, in part, to the repeal of section 110.061, Florida Statutes (1977). This Order vacated the portion of the previous order declaring section 110.061, Florida Statutes (1977), and its rules and regulations unconstitutional, and replaced it with a holding that the 1981 version of Chapter 110, Florida Statutes, and its implementing rules, were unconstitutional insofar as they failed to provide a prompt post-termination hearing. The Order

Amending Judgment also recognized that the law as to pre-termination due process was not clearly established at the time in question and vacated that portion of the prior order. However, the district court went on to find that Appellants had violated a regulation of their own agency, General Order 43, which required an investigation into the circumstances surrounding an alleged offense. The district court found that this violation deprived Appellants of good faith immunity.

Appellants appealed the district court's ruling, both on the constitutionality of Chapter 110, Florida Statutes (1981), and its implementing rules, and the issue of good faith immunity, to the Court of Appeals for the Eleventh Circuit. The Court of Appeals issued a Rule 25 affirmance, without explanation, based on the order of the district judge. (83a-

84a). Appellants filed a Petition for Panel Rehearing which was denied. (85a-86a). Appellants then filed a Notice of Appeal to the Supreme Court. (87a-88a).

SUMMARY OF ARGUMENT

I.A. Chapter 110, Florida Statutes (1981), and its implementing rules, insofar as they relate to post-termination hearings, are constitutional. The district court should never have reached the issue of the statute's constitutionality and entered a declaratory judgment on such a question because the court had no justiciable issue before it.

Federal constitutional law requires a live dispute before a declaratory judgment may be entered. Golden v. Zwickler, 394 U.S. 103 (1969). Appellee was terminated in 1977; the statute applicable to his termination was section 110.061, Florida Statutes (1977), which was subsequently repealed. Thus, no live controversy as to the 1981 statute, which the district court declared unconstitutional, could possibly have existed as to Appellee since the 1981

statute had neither been promulgated nor applied at the time of Appellee's termination.

Further, Appellee lacked the requisite personal stake in the outcome of the litigation which was necessary to invoke the power of a federal court. North Carolina v. Rice, 404 U.S. 244 (1971). Because Appellee voluntarily resigned from state employment in 1979, he could not possibly have been subject to the termination provisons of Chapter 110, Florida Statutes (1981). Thus Appellee's rights could in no way have been affected by a declaration as to Chapter 110's constitutionality.

Additionally, there was no remedy available to redress Appellee's alleged injuries. He was not entitled to an injunction because he voluntarily left state employment or to damages because of

the good faith immunity of the state officials. Thus, any ruling on the statute was simply an advisory opinion which the federal courts have no power to grant. United Public Workers of America v. Mitchell, 330 U.S. 75 (1947).

I.B. Chapter 110, Florida Statutes (1981), is constitutional on its face. It is clear that any court interpreting a statute has a duty to interpret that statute constitutionally if at all possible. Buttfield v. Stranaham, 192 U.S. 470 (1904).

While the statute in question does not on its face state a precise time during which a post-termination hearing must be held, the district court could have, and should have, as other courts have done in interpreting other statutes, see infra pp. 34-38, interpreted the statute to provide a hearing within a period the court

considered constitutionally mandated. Instead, the district court struck a statute fully capable of constitutional interpretation.

I.C. The statute in effect at the time of Appellee's termination was constitutionally applied to him. The time which elapsed between Appellee's appeal and the time such appeal was set for hearing was not so long as to render the statute constitutionally infirm.

II. Appellants are entitled to good faith immunity under this Court's ruling in Harlow v. Fitzgerald, 457 U.S. 800 (1982). Harlow redefined the test for determining the applicability of the good faith immunity defense and held that such defense is based on a strictly objective test. The lower courts were instructed to determine whether the law in question was clearly established at the time the complained of action occurred.

Harlow, 457 U.S. at 818-819. If the law was not clearly established, officials may rely upon the good faith immunity defense.

In this case, the district court explicitly found no violation of clearly established constitutional law. (67a). Rather than ending the inquiry there, however, the court went on to find that a violation of an invalid agency general order somehow abrogated Appellants' objective good faith immunity.

Such a ruling is in direct contravention of this Court's instructions in Harlow. Harlow makes it clear that good faith immunity is abrogated only if a clearly established constitutional right is violated. No such constitutional right was violated in this case, and thus Appellants are entitled to immunity from damages.

ARGUMENT

I

THE PROVISIONS OF CHAPTER 110, FLORIDA STATUTES (1981), WHICH RELATE TO POST-TERMINATION HEARINGS, ARE CONSTITUTIONAL.

A. The Issue of Chapter 110's Constitutionality Was Not a Justiciable Issue and Was Moot.

The district court, as affirmed by the appellate court, declared Chapter 110, Florida Statutes (1981), and its implementing rules, unconstitutional due to their failure to require a "prompt" post-termination hearing. However, the district court should neither have considered the issue nor entered a declaratory judgment on such a question because the court had no justiciable issue before it.

For a declaratory judgment to be appropriate, a live dispute as to the statute's constitutionality must be presented at the time of the court's hearing. "For adjudication of

constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite." Golden v. Zwickler, 394 U.S. 103, 108 (1969), quoting, United Public Workers of America v. Mitchell, 330 U.S. 75 (1947). The question must demonstrate a controversy between the parties of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment." 394 U.S. at 108.

A live dispute, as defined in Golden v. Zwickler, is lacking here for several reasons. First, in any case involving the constitutionality of a statute, the statute under attack must have been in effect at the time of the action complained of and must have been applied to the complaining party.

In International Longshoremen's and Warehousemen's Union, Local 37 v. Boyd, 347

U.S. 222 (1954), plaintiffs sought a declaratory judgment as to the enforcement of a federal statute. This Court found it had been asked to rule on a statute that had not been applied to plaintiffs. This Court stated:

> Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.

347 U.S. at 224 (citations ommitted).

In this case, the district court found Chapter 110, Florida Statutes (1981), unconstitutional. (80a). However, the action Appellee complained of, his discharge, occurred in 1977. Thus, the statute the district court struck had not been enacted by the Florida Legislature nor, like the Boyd plaintiffs, applied to Appellee at the time of his discharge some four years earlier. Therefore, no live

dispute could possibly have existed as to the constitutionality of Chapter 110, Florida Statutes (1981).

Nor can a live dispute be said to exist at this point in time. An actual controversy must exist at all stages of appellate review in order to avoid mootness. DeFunis v. Odegaard, 416 U.S. 312 (1974).

Second, in order for a declaratory judgment to be appropriate, the moving party must have a personal stake in the resolution of the issue before the court.[2] O'Shea v. Littleton, 414 U.S. 488, 494 (1974). In O'Shea, plaintiffs challenged bond-setting, sentencing and jury fee practices. But none of the plaintiffs suffered any of the injuries

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[2]This principle is equally applicable in cases where statutory questions are raised. 414 U.S. at 494.

specified in the complaint. Thus, this Court found that a personal stake was lacking, and no declaratory judgment could issue.

Further, if a party lacks "a legally cognizable interest in the outcome" of the litigation, the issue is moot and inappropriate for declaratory judgment. Murphy v. Hunt, 455 U.S. 478 (1982), quoting, United States Parole Commission v. Geraghty, 445 U.S. 388, 396 (1980). In Murphy v. Hunt, a statute prohibiting pre-trial bail for persons charged with sexual offenses was alleged to be unconstitutional. This Court deemed the claim for declaratory relief moot because the plaintiff had been convicted of the sexual offenses and was no longer subject to the provisions of the statute.

> If a dispute has . . . evanesced because of changed circumstances, including the passage of time, it is

> considered moot. With the designation of mootness comes the concomitant designation of nonjusticiability . . . 'Federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.'

In re S.L.E., Inc., 674 F.2d 359, 364 (5th Cir. 1982), quoting North Carolina v. Rice, 404 U.S. 244 (1971).

In the instant case, Appellee voluntarily left the state of Florida's employ in January, 1979. Since that time, he could not possibly have been exposed to the termination provisions of Chapter 110, Florida Statutes, which govern the termination of state employees. Appellee's status could not be affected in any way by a declaration as to the constitutionality of those laws. Therefore, because Appellee could in no way be affected by the Court's declaratory judgment, he did not possess the requisite "personal stake" in the

results of a declaratory ruling on the validity of Chapter 110 which would enable the district court to properly address that question.

Third, a claim for declaratory relief is moot if there is no possible remedy to redress the injuries claimed. Ashcroft v. Mattis, 431 U.S. 171, 172 (1977). When a litigant is entitled to neither injunctive relief nor damages, a declaratory judgment is an advisory opinion which the federal courts are without power to grant. 431 U.S. at 172.

In Ashcroft v. Mattis, the parents of a minor, who had been killed by police while attempting to flee to avoid arrest, challenged the constitutionality of the state statute which authorized the use of deadly force under such circumstances. The damage claims were unsuccessful due to the defendant officers' good faith immunity.

Because there was no basis for damages or an injunction, this Court held that there was no possible basis for a declaratory judgment. To hold otherwise, the Court stated, would be asking the trial court to answer "a hypothetical question whether the defendants would have been liable apart from their defense of good faith." 431 U.S. at 172.

In the instant case, Appellee voluntarily resigned from the Highway Patrol and did not seek reinstatement; therefore an injunction was not a possible remedy. Clearly damages were also not available in regard to the issue of the insufficiency of Chapter 110 simply because of its failure to require that a hearing be provided within a set period after dismissal from state employment. Also, the district court's award of damages was not based in any way upon the delay of the

Career Service Commission post-termination hearing.[3] Rather, the district court's order makes clear that the damages flowed from the claimed pre-termination procedural violations. (69a-71a). In fact, the district court stated that but for the adoption of General Order 43, providing for certain pre-termination procedures, "no damages of any kind could be awarded". (70a).[4]

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[3]The damages awarded were based on the finding that "Beach and Davis followed procedures contrary to the department's rules and regulations." (70a). They could not possibly be based on the timeliness of the Career Service Commission hearing over which Beach and Davis, as DHSMV employees, had no control.

[4]The district court stated: "If this departmental order [General Order 43] had not been adopted just prior to Scherer's dismissal, no damages of any kind could be awarded. . . . Beach and Davis . . . should be bound by their department's own orders. . . ." (70a-71a).

The court certainly could not have held otherwise, since the law relating to the timing of post-termination hearings was far from "clearly established" in the Northern District of Florida in 1977 and 1978. Weisbrod v. Donigan, 651 F.2d 334 (5th Cir. 1981).[5] Therefore, Appellants' good faith immunity[6] would bar any damages arising out of the delay in providing Appellee a post-termination hearing and no remedy was available for Appellee's alleged injuries.

Additionally, principles of equity forbid damages under the instant circumstances. Under Florida law, the Career Service Commission, a quasi-judicial

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[5]Fifth Circuit law governed the Northern District of Florida prior to the split of the Fifth Circuit into the Fifth and Eleventh Circuits. Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981).

[6]See the discussion of good faith immunity under II, infra.

executive agency,[7] has the responsibility to hear appeals of suspended or discharged state employees. Appellants, all employees of the DHSMV, an agency wholly separate and distinct from the Career Service Commission, certainly could not, in fairness, be held personally liable in damages for any delay of the Career Service Commission. Appellants had absolutely no authority or control in setting Appellee's appeal for hearing before the Commission.

Since neither injunctive nor monetary relief was available to Appellee as a result of the delay in the scheduling of his Career Service Commission hearing, under the rational of Ashcroft v. Mattis, 431 U.S. 171, Appellee's claim for declaratory relief was moot.

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[7]The Career Service Commission is a part of the Florida Department of Administration. §110.301, F.S. (1981). As such, its powers and duties are specifically delineated by the Legislature. §110.305, F.S. (1981).

B. Chapter 110, Florida Statutes (1981), Is Constitutional On Its Face.

Subsection 110.309(1), Florida Statutes (1981), states:

> A permanent employee in the State Career Service System who is suspended or dismissed by an agency or officer shall be entitled to a de novo fact-finding hearing.

The district court, as affirmed by the appellate court, apparently[8] found this section unconstitutional because it does not specify on its face a time certain by which the post-termination hearing must be held.

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[8]The district court's opinion does not point specifically to any section or subsection of the statute which is unconstitutional but simply says: "Chapter 110, Florida Statutes (1981) and its implementing rules are unconstitutional insofar as they fail to provide a prompt post-termination hearing." (75a). The above-quoted subsection is the one pertinent to post-termination hearings. The entire section is shown infra, p.3.

The lower court's order holding Chapter 110 unconstitutional violates the well-settled law of statutory interpretation. It is beyond doubt that every statute comes to the court with a presumption of constitutionality. As this Court has stated:

> In examining the statute in order to determine its constitutionality we must be guided by the well-settled rule that every intendment is in favor of its validity. It must be presumed to be constitutional, unless its repugnacy to the Constitution clearly appears.

Buttfield v. Stranaham, 192 U.S. 470, 492 (1904) (citations omitted).

Thus, if there was any way in which the district court could have interpreted Chapter 110, Florida Statutes, so as to render it constitutional, it should have done so.[9] Regional Rail Reorganization Act

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[9]While Appellants do not contend that their interpretation of the statute in question

(cont'd on next page)

Cases, 419 U.S. 102 (1974); Graham v. Richardson, 403 U.S. 365 (1971); United States v. Vuitch, 402 U.S. 62 (1971); Alabama State Federation of Labor v. McAdory, 325 U.S. 450 (1945).

Where a certain interpretation of a statute will cast doubt on the statute's constitutional validity, the court must avoid that interpretation unless there is a clear statement of legislative intent to the contrary. United States v. Thompson, 452 F.2d 1333, 1337 (D.C. Cir. 1971), cert. den., 405 U.S. 998 (1972). Accord, Port Construction Co. v. Government of Virgin Islands, 359 F.2d 663, 665 (3d Cir. 1966).

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is strained, it should be noted that even a strained interpretation is not only permissible but desirable if it will save the constitutionality of a statute. Ullmann v. United States, 350 U.S. 422 (1956); 2A Sutherland Statutory Constitution §45.11 (1973).

The fact that one of several alternative statutory interpretations will cause constitutional difficulties is a valid reason to reject that interpretation. As this Court has said:

> We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act.

National Labor Relations Board v. Laughlin Steel Corp., 301 U.S. 1, 30 (1936). See also, Missouri Pacific Railroad Co. v. Boone, 270 U.S. 466 (1926); 2A Sutherland Statutory Construction §45.11 (1973).

In the instant case, as with most cases of statutory construction, any analysis of the statute must begin by looking at the plain meaning of the statute itself. Lewis v. United States, 445 U.S. 55 (1980). "Interpretation of a statute begins with its plain words." Charter Air Center v.

Florida Public Service Commission, 503 F.Supp. 243, 244 (N.D. Fla. 1980), citing Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), cert. den., 449 U.S. 1113 (1981).

The statute in question here clearly and unequivocally provides for a post-termination hearing in the case of a discharged state employee. It must be presumed that the Florida Legislature, in enacting such a requirement, intended the hearing requirement to occur within constitutional time limits. Houston and Texas Central Railroad Co. v. Texas, 177 U.S. 66 (1900); Southwestern Railway Co. v. Arkansas, 235 U.S. 350 (1914); United States v. Thompson 452 F.2d 1333 (D.C. Cir. 1971), cert. den., 405 U.S. 998 (1972); 2A Sutherland Statutory Construction §45.11 (1973).

The lower court should have upheld the cosntitutionality of Chapter 110 by

interpreting it to provide a hearing within whatever time the lower court considered necessary in order to meet the requirements of promptness.[10] Such interpretations have been made in many instances in order to save a statute from unconstitutionality. 2A Sutherland Statutory Construction §45.11 (1973).

In United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971), this Court considered the constitutionality of 19 U.S.C. §1305(a) which authorized the seizure of obscene materials by customs collectors and provided for forfeiture proceedings, but failed to prescribe time limits for the institution and completion

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[10]It should be noted that this is not a case where the statute affirmatively contains an unconstitutional provision, such as totally prohibiting a post-termination hearing. In this case, the statute apparently offended the lower court by omitting some court-preferred language.

of forfeiture proceedings. This Court noted that while the statute did not contain explicit time limits, "it is possible to construe the section to bring it in harmony with constitutional requirements." 402 U.S. at 368. In saving the statute's constitutionality, this Court simply read in time limits consistent with appropriate case law.

In Jordan v. United Insurance Co. of America, 289 F.2d 778 (D.C. Cir. 1961), the issue was whether the Superintendent of Insurance had the statutory authority to conduct a hearing mandated by due process. The court found that the duty to conduct the hearing, together with any necessary powers to conduct such hearing, was to be implied from the statute. The court stated that:

> If such a hearing is the only way in which plaintiff can receive due process, then we will draw

> the implications necessary to save the constitutionality of the statute.

289 F.2d at 782.

Similarly, in Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978), there was a question about delays prior to hearings on social security benefits. In that case, where the court did find the delays to be unreasonable, it nevertheless devised a remedy. The court stated that it would "set time limts for agency action to insure that statutory rights are vindicated." 583 F.2d at 16.

In Cornelius v. Minter, 395 F.Supp. 616 (D.C. Mass. 1974), the court found that the waiting period for welfare services was not reasonably prompt as required by statute. In that case, the court stated that: "Courts are uniquely suited to determining what is reasonable in such a situation." 395 F.Supp. at 621 (citations omitted).

Finally, in People v. Armor, 523 P.2d 1173 (Cal. 1974), the issue was whether a California statute requiring the defendant to pay for appointed counsel deprived her of property without due process. In that case, the statute in question did not expressly provide for notice and a hearing. However, the court found that the absence of express provisions did not make the statute unconstitutional. The court said:

> Not only may the requirements of notice and a hearing be implied from the due process clause, but, in addition, the rights to discovery, confrontation, cross-examination, and other procedural devices may likewise be implied.

523 P.2d at 1179.

Thus, as the above cases illustrate, the lower court in this case should have construed Chapter 110, Florida Statutes, to include what it considered to be a reasonable time limit for the holding of a

post-termination hearing, in order to save the constitutionality of the statute.

Additionally, a distinction is often made between a statute which is void on its face and incapable of any valid application and a statute which is unconstitutionally applied. See, Thornhill v. State of Alabama, 310 U.S. 88 (1939); 1 Sutherland Statutory Construction §2.06 (1973). And, even if the lower court was correct in finding the statute unconstitutionally applied in Appellee's case,[11] the statute should not have been declared unconstitutional.

A statute is defined as facially invalid when it is "always and however applied" invalid. Davis v. Williams, 617 F.2d 1100, 1105 (5th Cir. 1980), cert.

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[11]Appellants contend that the statute was constitutionally applied to the Appellee. See, I.C., infra.

den., 449 U.S. 937 (1981). In Davis, the Court of Appeals for the Fifth Circuit reversed the lower court's finding that a regulation limiting the speech of firemen was facially invalid. The court found that the regulation could be constitutionally applied and that "to strike it down, therefore, would require a departure that is beyond our powers." 617 F.2d at 1105.

Similarly, in Bickel v. Burkhart, 632 F.2d 1251 (5th Cir. 1980), the court defined "malicious" in such manner as to uphold the constitutionality of a regulation limiting speech. The court found the regulation in question facially valid, but unconstitutionally applied. See also, Anderson v. Edwards, 505 F.Supp. 1043 (S.D. Ala. 1981).

Thus, in the instant case, even if the lower court was correct in finding the statute unconstitutionally applied to

Appellee, it is not facially unconstitutional because it is capable of constitutional interpretation as demonstrated above. The lower court clearly should have set an appropriate time limit and required compliance with that time limit in order to save the statute from facial unconstitutionality.

C. Chapter 110, Florida Statutes, Was Constitutionally Applied to Appellee.

There is no dispute among the parties that approximately nine months elapsed between the time Appellee filed his Career Service Commission appeal and the time such appeal was set for hearing. Relying on the case of Barry v. Barchi, 443 U.S. 55 (1979), the lower court concluded that this length of time was so long as to deny Appellee a constitutionally satisfactory post-termination hearing.

However, the rationale behind the decision in Barry is totally inapposite to Appellee's situation. In Barry, a horse trainer's license was suspended for fifteen days upon suspicion that one of his horses had been drugged. The statute in question provided for a suspension that would remain in effect pending a post-suspension hearing. The statute did not specify a time for the hearing.

This Court found the statute in Barry to be unconstitutionally applied because it did not assure a timely hearing. This Court noted that because of the brief suspension, no hearing would be held until the full penalty had already run. This Court further emphasized the fact that the "consequences to a trainer of even a temporary suspension can be severe. . . ." 443 U.S. at 66. The trainer would be very likely to lose the clients he had

cultivated over his career and such a loss could not be remedied by any post-suspension hearing. Therefore, this Court found it necessary to hold that the trainer receive his suspension hearing either before or immediately after the suspension.

Appellee's situation is to be contrasted with the facts of Barry. The Florida Career Service Commission is, and was, authorized to award back pay as well as order the reinstatement of a prevailing employee. See, §110.061(3), Florida Statutes (1977); §110.309(3), Florida Statutes (1981). Upon prevailing at the Career Service Commission, Appellee in this case could be, and was, made whole, unlike the plaintiff in Barry who might never hope to recover the loss of his past or future clients. Therefore, Barry does not support the lower court's ruling.

More to the point are the cases dealing with situations in which the government affords a hearing after governmental action has occurred. These cases reveal several principles instructive in the instant case. First, government agencies are generally afforded substantial discretion in the scheduling of hearings. "Courts must normally defer to agency judgment to allow the evolution of procedures as needs arise." Caswell v. Califano, 583 F.2d 9, 15 (1st Cir. 1978) (citation omitted).

In Wilkinson v. Abrams, 627 F.2d 650 (3d Cir. 1980), the issue was the validity of a regulation concerning the administrative appeal process used by states in the state unemployment compensation program. The regulation in question stated that the appeals would be decided with the greatest promptness administratively feasible. The plaintiffs argued that such a regulation

fostered undue delays and deprived them of due process.

In upholding the regulation, the court noted that the goal of promptness was met. It stated that it could not impose standards for administrative performance that were not feasible and that to do so would jeopardize promptness and accuracy. The court further noted that trying to force an agency to act within an administratively unfeasible timetable would increase the likehood of erroneous decisions.

Thus the Wilkinson court recognized the neccessity of deferring to the agency's judgment. In this case, deference must be given to the Florida Career Service Commission which scheduled hearings as quickly as was feasible at the time, given the resources then available.

A second principle which emerges from cases discussing post-governmental action hearings is that the party complaining of a denial of due process because of delay must show that he was prejudiced by such delay. In Blackford v. Maryland Automobile Insurance Fund, 532 F.Supp. 24 (D. Md. 1981), laid off employees challenged their dismissal under §1983 on due process grounds, due to the fact that approximately three and one half years had elapsed between the time administratiave proceedings started and a final opinion was entered. The court found that the plaintiffs did not state a due process claim because they had not shown prejudice. The court stated that the plaintiffs could still come to federal court with their claims and that they were in no better or worse position in regard to these claims.

Similarly, in Ross v. United States Post Office, 664 F.2d 191 (8th Cir. 1981), a delay by the federal Merit System Protection Board of almost one year in declining to review plaintiff's appeal was not shown to be prejudicial, and thus the court found no denial of due process. In the instant case, because Appellee could be made whole under the statutory scheme of the Florida Career Service Commission and because he could still bring his claims to federal court, he can demonstrate no prejudice.

Third, a review of court decisions to determine what is an acceptable length of time between governmental action and a hearing reveals that there is no absolute constitutionally mandated time by which a hearing must be held. Delays longer than or approaching that experienced by Appellee have been found to be constitutional.

For example, in Blackford v. Maryland Automobile Insurance Fund, supra, a three and one half year delay was held not to deny due process. In Alsbury v. United States Post Office, 530 F.2d 852 (9th Cir. 1976), cert. den., 429 U.S. 828 (1977), a delay of approximately six months was found to fall considerably short of what would be necessary to demonstrate a deprivation of constitutional due process.

In Thompson v. Bass, 616 F.2d 1259 (5th Cir. 1980), cert. den., 449 U.S. 983 (1980), a delay of approximately six months between a permanent employee's discharge and reinstatement apparently did not offend due process. In Ciechon v. City of Chicago, 634 F.2d 1055 (7th Cir. 1980), due process was not denied where it took more than six months from the filing of charges to get a decision on a suspension.

The above survey makes it clear that there is a wide variation as to the definition of promptness required by due process. It cannot be said in Appellee's case that the delay in question was of such a magnitude as to deny him due process.

Finally, Appellee cannot complain of any time lag in his requested hearing where he failed to seek an expedited hearing. Dorothy Roberts, Career Service Coordinator for the State of Florida, testified at trial that if Appellee had requested an expedited hearing, one would have been held. (T, vol. I, p. 19). In Stolberg v. Caldwell, 423 F.Supp. 1295 (D. Conn. 1976), the court held that the plaintiff could not complain of the slowness of his remedy (in that case a state court remedy) where he had not sought an expedited hearing. Clearly, the statute was constitutionally applied to Appellee and his complaint that

he was not afforded due process must be denied.

II.

APPELLANTS ARE ENTITLED TO GOOD FAITH IMMUNITY BECAUSE THEIR CONDUCT DID NOT VIOLATE CLEARLY ESTABLISHED FEDERAL CONSTITUTIONAL LAW.

Beginning with Scheurer v. Rhodes, 416 U.S. 232 (1974), this Court has consistently held that government officials are shielded from an award of damages for a violation of 42 U.S.C. §1983 by a qualified immunity defense based on the good faith performance of their duties. Scheurer announced the qualified immunity defense in very general terms. Scheuer instructed the courts to look to the scope of discretion and responsibilities of the office and all circumstances as they reasonably appeared at the time of the action in question. However, this Court recognized that the doctrine of good faith immunity was not static and would be developed in more detail in subsequent cases. 416 U.S. at 249.

This Court's next pronouncement on good faith immunity came in Wood v. Strickland, 420 U.S. 308 (1975), which dealt with the immunity of public school officials. A definite two-prong test for determining whether an official acted in good faith and would therefore be shielded from an award of damages in a suit brought under §1983 was established. This two-prong test consisted of an objective and subjective portion relating to the official's objective knowledge of the law as well as his subjective intent.

In Wood v. Strickland, the Court emphasized important policy reasons for fashioning a qualified immunity defense for public officials.

> "Public officials, whether Governors, Mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices.

> Implicit in the idea that officials have some immunity -- absolute or qualified -- for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all." Scheuer v. Rhodes, 416 U.S., at 241-242, 94 S.Ct., at 1689 (footnote omitted).

420 U.S. at 321.

Those policy reasons are of equal importance today. Decision makers must be allowed to act in accordance with the law and, on occasion, to err without being liable for these decisions. To require otherwise is to chill the action of making decisions.

In Procunier v. Navarette, 434 U.S. 555, 562 (1977), this Court further explained that under the "objective" prong of the good faith immunity test, the immunity defense is unavailable to officials sued for damages under §1983 when three elements are present: (1) "the

constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct", (2) "they knew or should have known of that right", and (3) "they knew or should have known that their conduct violated the constitutional norm" (emphasis added).

The second prong of the good faith immunity test is a "subjective" one, and asks whether the official acted with "actual malice". Wood v. Strickland, 420 U.S. 308, 321. If so, the good faith defense is unavailable. Id., see also, Butz v. Economou, 438 U.S. 478 (1978).

Subsequent experience with the good faith immunity defense in the federal courts proved that the subjective element of the defense was unworkable. Thus, when recently presented with the good faith immunity issue, this Court found that:

> It now is clear that substantial costs attend the litigation of the subjective good faith of government officials. . . . -- distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. . . . Judicial inquiry into subjective motivation. . . can be peculiarly disruptive of effective government.

Harlow v. Fitzgerald, 457 U.S. 800, 816-817 (1982) (footnotes omitted).

To remedy this, in Harlow, this Court totally eliminated the subjective prong of the immunity defense[12] and held that the

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[12]As Justice White recently stated: "Just last Term, we modified the qualified immunity public officials enjoy in suits seeking damages against federal officials for alleged deprivations of constitutional rights, eliminating the subjective component of the standard. See, Harlow v. Fitzgerald, ___ U.S. ___, 102 S.Ct, 2727, 73 L.Ed.2d 396 (1982)." Illinois v. Gates, ___ U.S. ___, 103 S.Ct. 2317, 2347 (1983), Justice White concurring.

The Court of Appeals for the Eleventh Circuit put it this way:

> Since the Supreme Court decision in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the standard for gauging the good faith of government officials . . . has been an objective one. Scott

(cont'd on next page)

proper scope of judicial inquiry into the official's conduct in determining whether the immunity defense would be available was solely limited to the objective test.

> [T]he judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly to be said to "know" that the law forbade conduct not previously identified as unlawful.

457 U.S. at 818 (emphasis added). Thus, the above review of the history of the good faith immunity doctrine demonstrates that the objective prong of the immunity

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v. Dixon, (11th Cir., No. 82-8376, Dec. 15, 1983.)

Another court has noted that:

> Harlow . . . jettisoned the subjective, fact-oriented element of qualified immunity and recast the doctrine in terms of objective good faith. McSurely v. McClellan, 697 F.2d 309, 316 (D.C. Cir 1982).

defense, as set out in Wood and Procunier, is the present standard for determining good faith immunity.

Analyzed in light of the evolving doctrine of good faith immunity and this Court's definitive pronouncement on the subject in Harlow v. Fitzgerald,[13] the lower court's denial of good faith immunity to Appellants was clearly wrong. In its Order Amending Judgment (64a), the lower court specifically found that at the time of the official conduct which gave rise to Appellee's claim that his pre-termination due process rights were violated, there was

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[13]Though Harlow involved federal, not state officials, Harlow's immunity principles are applicable here. In Butz v. Economou, 438 U.S. 478, 504 (1978), this court found that "it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under §1983 and suits brought directly under the Constitution against federal officials."

no clearly established constitutional law that such conduct violated Appellee's rights.[14] (66a-67a). Under Wood, and Procunier as limited by Harlow, this should have ended the inquiry into the good faith immunity defense, and judgment for the Appellants should have been entered.[15]

The lower court found, however, that because Appellants had not followed the FHP General Order 43 in dismissing Appellee,

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[14]In making this decision, the district court relied on a Fifth Circuit case which held that the law as to pre-termination due process was not clearly established until late 1978. Weisbrod v. Donigan, 651 F.2d 334 (5th Cir. 1981). Appellee was discharged in 1977.

[15]The lower court's decision was entered shortly before Harlow was announced. However, because the lower court found that Appellants acted without malice, only the objective prong of the good faith immunity test was at issue. The lower court explicitly stated: "These damages should not be considered PUNITIVE damages, which would have been awarded if the defendants' actions demonstrated malicious intention." (54a).

they violated clearly established state law. [16] Therefore, the lower court erroneously concluded that Appellants did not meet the objective test for good faith immunity.

In making this determination, the lower court relied on Williams v. Treen, 671 F.2d

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[16]This conclusion is erroneous in several respects. First, General Order 43 required a complete investigation into the facts of the offense and a written statement by the employee. As the Statement of Facts indicates, General Order 43 was followed in Appellee's case. Statement of Facts, supra. pp. 7-8. Second, the lower court found that General Order 43 was promulgated pursuant to Chapter 120, Florida Statutes. (69a). However, General Order 43 was not promulgated pursuant to Florida's Administrative Procedures Act until March 19, 1981. Ch. 15B-11.14, Fla. Admin. Code. Therefore it did not have the effect of law until some four years after Appellee's discharge. Prior to that time, General Order 43 was not state law, nor was it even a valid rule or regulation under Florida law. General Development Corp v. Divison of State Planning, Department of Administration, 353 So.2d 1199 (Fla. 1st DCA 1977); Florida Department of Offender Rehabilitation v. Walsh, 352 So.2d 575 (Fla. 1st DCA 1977).

892 (5th Cir. 1982), cert. den., ___ U.S. ___, 103 S.Ct. 762 (1983) and the superceded "reasonableness" language of Scheuer. In both Williams and the lower court's order sub judice, the respective courts looked back to this Court's initial and general announcement of the good faith immunity test in Scheuer v. Rhodes. Reasoning that Scheuer had announced a general test of "reasonableness" of the official's conduct, the court in Williams and the lower court here held that, because official conduct which violates state law is not "reasonable", the good faith immunity defense does not shield the official from an award of damages.

Such strained reasoning is clearly contrary to this Court's elucidation of the good faith immunity test in Harlow. To rely on the early general discussion of reasonableness in Scheuer is to ignore the substantial development of the good faith

immunity defense in subsequent cases. This Court's explicit instructions as to the content of the immunity defense in Wood, Procunier, Butz and Harlow were meant to clarify the requirements for good faith immunity.

This Court has been most specific in detailing the exact nature of the proper scope of judicial inquiry into the official's conduct in determining whether good faith immunity is available. This Court in Scheuer recognized that further development of the very general test for good faith immunity set out in that case was necessary. "These cases, in their present posture, present no occasion for a definitive exploration of the scope of immunity available to state executive officials. . . ." Scheuer v. Rhodes, 416 U.S. at 249.

An opportunity to be "definitive" concerning the good faith immunity test arose in Procunier v. Navarette, supra, where this Court said that, objective good faith immunity is unavailable to state officials only if "the constitutional right allegedly infringed . . . was clearly established at the time of their challenged conduct" and "they knew or should have known of that right" and "they knew or should have known that their conduct violated the constitutional norm." Procunier v. Navarette, 434 U.S. at 562 (emphasis added).

In Procunier, the plaintiffs had alleged that prison officials, in violating their constitutional rights, had also violated certain prison mail regulations. Yet this Court held that "[a]s a matter of law . . . there was no basis for rejecting the immunity defense on the ground that

petitioners [prison officials] knew or should have known that their alleged conduct violated a constitutional right." 434 U.S. at 565.

There was no suggestion in Procunier that violation of the prison mail regulations, akin to the FHP's General Order 43, was a proper consideration in determining whether the objective good faith immunity test had been met. Instead, this Court, in determining whether the constitutional right in question was clearly established at the time the official conduct took place, did so "by reference to the opinions of this Court, of the Court of Appeals, or of the local District Court." 434 U.S. at 565.

Procunier, Wood, Butz, Harlow, and other federal cases following these decisions, have consistently stated the objective good faith immunity test

exclusively in terms of whether the constitutional law allegedly violated was clearly established at the time of the conduct in question. Numerous cases, both before and after Harlow, illustrate this concept.

Good faith immunity has been granted where the constitutional law was not clearly established. Johnson by Johnson v. Brelje, 701 F.2d 1201 (7th Cir. 1983), was a §1983 action in regard to the commitment of defendants found unfit to stand trial. All males found unfit to stand trial in Illinois were automatically committed to a maximum security mental health facility. The court found this violative of a state statute (Ill. Rev. Stat. Ch. 91 1/2, §2-102 (1981)) which required that an inmate be placed in the least restrictive environment.

However, even though defendants had violated a state statute, the court still found them entitled to immunity.

> We believe that the defendants did not violate the plaintiffs' clearly established constitutional rights and thus cannot be held liable for damages. When state officials act, they cannot be expected to anticipate subsequent legal developments nor can they be said to "know" that the law forbids conduct not previously identified as unlawful. [Harlow v. Fitzgerald], 102 S.Ct. 2739. We are aware of no prior case that has interpreted or determined the significance of Ill. Rev. Stat. Ch. 91 1/2, §2-102 -- the source of the state-created liberty interest in this case. The defendants' practice of making general regulations . . . is not, in itself, an unconstitutional practice. The defendants should not be held liable for failing to identify §2-102, to relate this provision to the Fourteenth Amendment, and to institute procedures that satisfy the minimum requirements of due process (emphasis in original).

701 F.2d at 1210.

Similarly, in Silverman v. Ballantine, 694 F.2d 1091 (7th Cir. 1982), immunity was granted to state officers. In Silverman,

representatives of the decedent's estate sued various officials due to decedent's death of a heart attack after his arrest. The court held that defendants were entitled to immunity unless they should have known that their actions violated the decedent's constitutional rights. The court found that defendants could not have known that the decedent had a Sixth Amendment right to counsel at the time of his arrest; thus they were entitled to immunity.

Conversely, good faith immunity has been denied where the constitutional law in question was clearly established. In Rhode Island Affiliate, American Civil Liberties Union, Inc. v. Rhode Island Lottery Commission, 553 F.Supp. 752 (D.R.I. 1982), immunity was denied to officials under Harlow, where it was clear that the treatment of the ACLU's application to hold

a raffle violated its First Amendment rights.

In Fujiwara v. Clark, 703 F.2d 357 (9th Cir. 1983), officials were denied immunity in connection with an employee's discharge where they should have known that their conduct violated plaintiff's constitutional rights. The court found that defendants should have known that plaintiff's discharge for the exercise of First Amendment rights violated the standard of Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). See also, Williams v. Bennett, 689 F.2d 1370, 1385 (11th Cir. 1982), U.S. app. pndg. (unconstitutional prison conditions); Crowder v. Lash, 687 F.2d 996, 1007 (7th Cir. 1982) (prisoners' rights to due

process, access to courts, freedom of religion).[17]

Interjecting state regulations into the analysis of good faith immunity does nothing but confuse two unrelated issues.

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[17]Numerous other cases have framed the objective good faith immunity test in terms of a constitutional violation. See, e.g., Coleman v. Turpen, 697 F.2d 1341, 1344 (10th Cir. 1983); Barnett v. Housing Authority of Atlanta, 707 F.2d 1571, 1582 (11th Cir. 1983); Ward v. Johnson, 690 F.2d 1098, 1111-1112 (4th Cir. 1982); Brewer v. Blackwell, 692 F.2d 397, 399 (5th Cir. 1982); Smith v. Heath, 691 F.2d 220, 226 (6th Cir. 1982); Clanton v. Orleans Parish School Board, 694 F.2d 1084, 1100 (5th Cir. 1981); Jihaad v. O'Brien, 645 F.2d 562 (6th Cir. 1981); Jackson v. State of Mississippi, 644 F.2d 1142, 1145 (5th Cir. 1981); Douthit v. Jones, 619 F.2d 527, 532-33 (5th Cir. 1980); Cruz v. Beto, 603 F.2d 1178, 1185 (5th Cir. 1979); Bogard v. Cook, 586 F.2d 399, 411 (5th Cir. 1978), cert. den., 444 U.S. 883 (1979); Schiff v. Williams, 519 F.2d 257, 261 (5th Cir. 1975); Lowe v. Carter, 554 F.Supp. 831, 836 (E.D. Mich. 1982); Peterson v. Davis, 551 F.Supp. 137, 146 (D. Md. 1982); Strathie v. Department of Transportation Commonwealth of Pa., 547 F.Supp. 1367, 1378 (E.D. Pa. 1982); Nakao v. Rushen, 545 F.Supp. 1091, 1092 (N.D. Cal. 1982).

It forces the federal courts to decide on a case-by-case basis when there is a sufficient relationship between a constitutional right and a state regulation or state law so that violation of that state regulation or law negates objective good faith immunity. Such a quagmire would be intolerable.

At most, then, the Williams v. Treen formula for good faith immunity encourages adherence to state statutes, rules and regulations, a subject of doubtful concern to the federal courts[18] and one which is adequately addressed, at least in the state of Florida, by state law. See, §110.309 (de novo review of employee suspensions and dismissals by State Career Service Commission); §120.68 (right of any person

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[18]A violation of state law alone certainly does not vest a federal court with federal jurisdiction.

adversely affected by agency action to judicial review thereof), Florida Statutes (1981). Conversely, the Williams v. Treen test does much to restore the fear of damage suits which cripples state governmental operations, a fear this Court sought to alleviate in Harlow.

If the decisions of the lower court and Williams v. Treen are followed, state officials must operate with the fear that, even though a citizen has no clearly established constitutional right, if state statutes or regulations are not followed, and those statutes or regulations are later[19] determined by federal court to have

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[19]The court recognized the unfairness of this situation in Wood v. Strickland, 420 U.S. at 319:

> Liability for damages for every action which is found subsequently to have been violative of a student's constitutional rights and to have caused compensable injury would

(cont'd on next page)

foreshadowed, perhaps several years hence, subsequently developed constitutional law, the officials will be liable for damages.[20] This flies directly in the face of this Court's statement in Procunier that officials "cannot be expected to predict the future course of constitutional law." 434 U.S. at 562. See also, O'Conner v. Donaldson, 422 U.S. 563, 577 (1975), where this Court said "an official has, of

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unfairly impose upon the school decisionmaker the burden of mistakes made in good faith. . . .

[20]In light of the Supreme Court's decision in Butz v. Economou, 438 U.S. 478 (1978), that there is no reason to distinguish between state and federal officials' immunity defenses, a narrowing of the objective good faith immunity test would apply to federal officials also. See footnote 13. Thus, the good faith immunity defense would be unavailable to any federal official who violated a federal statute, rule or regulation, even though the constitutional right in question was not clearly established at the time of the official conduct which gave rise to the plaintiff's suit.

course, no duty to anticipate unforseeable constitutional developments."

Additionally, to decide the good faith immunity defense by reference to state law punishes those state agencies which have adopted procedures going beyond the requirements of federal constitutional law. Thus, a state agency would best be served by not providing any procedures for the protection of employees, prisoners, students or the general public unless required to do so by clearly established federal constitutional law. If no procedures are adopted, state officials cannot be held liable for damages even if, in the future, a federal court decides those procedures are constitutionally mandated. If prophylactic procedures are adopted and later found to be constitutionally required, agency officials will be liable in damages for failure to follow

their own procedures, if the reasoning of Williams v. Treen and the lower court is sanctioned by this Court. The end result is that the agency which is trying harder to provide protective procedures is punished.

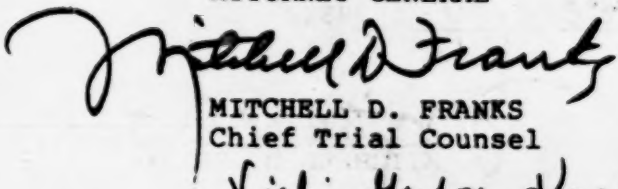
The lower court's decision that qualified good faith immunity was not available to Appellants because they did not follow an invalid agency general order contravenes this Court's cases establishing that "an official [will] not be held liable in damages under §1983 unless the constitutional right he has alleged to have violated was 'clearly established' at the time of the violation." Butz v. Economou, 438 U.S. at 498.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the judgment below be reversed and that judgment be enterd in favor of Appellants.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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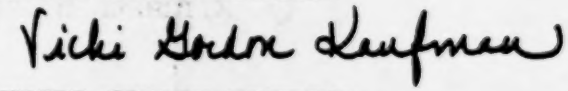

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ben R. Patterson, Patterson & Traynham, 1215 Thomasville Road, Post Office Box 4289, Tallahassee, Florida 32303, this 9th day of FEBRUARY, 1984.

MITCHELL D. FRANKS

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NO. 83-490

in the Supreme Court of the United States

OCTOBER TERM, 1983

RALPH DAVIS, ET AL.,

Appellants,

vs.

GREGORY SCOTT SCHERER,

Appellee.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

I

DOES THE VIOLATION OF CLEARLY ESTABLISHED PRINCIPLES OF CONSTITUTIONAL LAW ABROGATE A STATE OFFICIAL'S DEFENSE OF GOOD FAITH IMMUNITY?

II

IN OCTOBER, 1977, DID CLEARLY ESTABLISHED PRINCIPLES OF DUE PROCESS OF LAW REQUIRE THAT A PERMANENT CAREER CIVIL SERVICE EMPLOYEE, PRIOR TO BEING DISCHARGED, BE PROVIDED WITH SOME NOTICE IN WRITING OF HIS PROPOSED DISCHARGE OR AN OPPORTUNITY TO RESPOND VERBALLY OR IN WRITING TO THE OFFICIAL CHARGED WITH MAKING THE TERMINATION DECISION?

III

IN OCTOBER, 1977, DID CLEARLY ESTABLISHED PRINCIPLES OF EQUAL PROTECTION REQUIRE THAT A STATE AGENCY APPLY ITS PERSONNEL POLICIES EQUALLY, OR COULD AN AGENCY TREAT SIMILARLY SITUATED EMPLOYEES IN A DISPARATE FASHION?

IV

IF CLEARLY ESTABLISHED PRINCIPLES OF DUE PROCESS OF LAW DID NOT REQUIRE SUCH NOTICE OR AN OPPORTUNITY TO RESPOND, MAY A STATE OFFICIAL BE HELD LIABLE FOR COMPENSATORY DAMAGES WHEN HE IS NOT PERFORMING A DISCRETIONARY FUNCTION AND A STATE REGULATION PROVIDING PRE-TERMINATION PROCEDURAL PROTECTIONS HAS BEEN VIOLATED BY THE STATE OFFICIALS?

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ARGUMENT I

THE DEFENDANTS' TERMINATION OF GREGORY SCHERER'S EMPLOYMENT VIOLATED HIS CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS. THEREFORE THE AWARD OF DAMAGES IS CONSISTENT WITH *HARLOW v. FITZGERALD*, 457 U.S. 800 (1982) 13

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INTRODUCTORY STATEMENT

This Court need not address any of the issues posed by the defendant-appellants and the United States.

The appellee, Gregory Scott Scherer, agrees that the District Court erred in declaring unconstitutional a Florida Civil Service statute which could not affect his interests, since he had resigned from state service before the statute had been enacted. Our agreement is detailed at p. 34, *infra*. Therefore, the portion of the District Court judgment addressed to the newly enacted statute's invalidity should be vacated.[1]

The *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), issue posed by the respective questions presented need not be addressed because they proceed from an erroneous assumption. The defendants and the Solicitor General posed nearly identical questions:

> Whether the violation of agency regulation or state law abrogates the defense of good faith immunity when the conduct in question does not violate clearly established federal constitutional law.

Brief for Appellants, p. i.

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[1]Resolution of that issue, which is the basis of the Court's appellate jurisdiction in this case, ends the matter. Since the defendants did not seek certiorari review, which could have encompassed both questions they present, no jurisdiction exists to review their immunity claim. See 12 *Moore's Federal Practice* ¶435.01[2] at 6-55-56 (2d ed. 1982), Stern & Gressman, *Supreme Court Practice* 68 (5th ed. 1978) and the discussion in the Solicitor General's Brief at 4, n. 5.

The United States asked:

> Whether the violation of an administrative regulation abrogates a government official's qualified immunity from a constitutional damages suit, even though such conduct did not violate any clearly established constitutional right of the plaintiff.

Brief for United States, p. (I).

Appellee Scherer contends that the conduct complained of *did* violate clearly established principles of constitutional law, and the District Court's initial opinion to that effect was proper for the reasons it advanced and other reasons.[2]

If we are correct, there is no need to reach the "violation of regulation" theory upon which the defendants and the United States have premised their arguments. In case we are incorrect, we have responded to the *Harlow* arguments.

---

[2]In addition to the failure to accord any pre-termination procedural protections, the District Court also noted that two co-workers had not been penalized although they engaged in the same conduct which led to Scherer's dismissal. On appeal, Scherer may raise these grounds to support the judgment of the District Court and the Court of Appeals. They are alternative grounds for affirming the judgment below, and result in no greater relief than that awarded by the District Court and the Court of Appeals affirmance. Therefore these arguments are properly presented. *United States v. Raines*, 367 U.S. 17, 27 n. 7 (1960); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n. 11 (1960); *Barry v. Barchi*, 443 U.S. 55, 69 n. 1 (1978) (Brennan, J., concurring).

STATEMENT OF THE CASE

The Statements of the Case submitted by the defendants and the United States are accurate, but incomplete. Because they neglect to fully discuss important aspects of the proceedings below, we briefly address those omissions.

A. The District Court's Extensive Findings of Fact

No challenge has been made to the detailed findings of fact entered by the District Court. In its opinion, reported at 543 F.Supp.4 (N.D. Fla. 1982) (J.S. App. 1a-53a), the Court outlined the "conflict of interest" problem which led to Gregory Scott Scherer's dismissal from his career civil service position as a radio-teletype operator for the Florida Highway Patrol.

Scherer, relying on an initial letter of approval from his supervisor, accepted parttime employment as an Escambia County Sheriff's Reserve Deputy to guard the movie set for "Jaws II", then being filmed in Escambia County (Pensacola), Florida. 543 F.Supp. at 7-8 (J.S. App. 5a-6a).

Subsequently he was informed that his employment violated a Department policy on dual employment and that his outside job "might conflict with his duties as a radio operator . . .". *Id.*, at 8; 8a. However,

> No one ever identified the conflict to plaintiff; Wiggins [a supervisor] testified he didn't know what the conflict was.

Id.

The recommended sanction under the Department's disciplinary guidelines was a three day suspension. *Id.* But on October 25, 1977, Scherer received a letter of termination from the Director of the Florida Highway Patrol. The District Court found:

> At no time prior to the letter of termination was the plaintiff given notice in writing of a proposed discharge or an opportunity to respond verbally or in writing to the official charged with making the termination decision, the defendant [Florida Highway Patrol Director] Beach. At no time prior to October 25, 1977, was the plaintiff notified of any right that he might have to respond to Col. Beach's letter of dismissal. There is no evidence of any affidavit or statement given or made to Beach or Davis [the Director of the State Department encompassing the Highway Patrol] which showed or purported to show that the plaintiff's outside employment conflicted in any manner with his duties as a radio-telephone operator . . . although the conflict has purportedly been identified by Beach's staff. In addition, the choice to dismiss rather than suspend Scherer is in violation of the Department's own disciplinary guidelines.
>
> *Id.* at 9; 9a-10a.

In addition, the District Court found that two other Florida Highway Patrol employees in Scherer's Troop were given approval to "work secondary employment as security personnel on the Universal Studio's set in

[neighboring] Santa Rosa County", and their approval was never revoked". *Id.*, at 8, n. 1; 54a.

Several months later, pursuant to Scherer's challenge to the Department's dual employment policy, a Florida Administrative Hearing Officer declared that the policy had not been validly adopted, and invalidated it. *Id.* at 9; 11a-12a.

Scherer, on November 10, 1977, filed for a hearing with the Florida Career Service Commission. The hearing was ultimately scheduled for August 4, 1978, over nine months after he had been terminated. Prior to the hearing a negotiated settlement was agreed upon, providing Scherer with reinstatement as of August 4, 1978, and approximately half of his lost back pay. *Id.* at 9-10; 12a-14a.[3]

The District Court found that after his October, 1977 dismissal and prior to his negotiated reinstatement, Scherer worked only odd jobs, was forced to borrow money, had personal property repossessed, lost weight, suffered a deterioration of physical and mental health,

---

[3]Scherer's reinstatement was not easily accepted by his supervisors. The District Court detailed the work problems which ensued, leading to Scherer's eventual resignation from the Highway Patrol on January 13, 1979. The Court, although concluding Scherer's resignation waived any complaints about his subsequent treatment, was sympathetic about Scherer's post reinstatement treatment:

> Although there is no evidence that an order to "hard time" plaintiff came down the chain of command, . . . [his supervisors] apparently did exactly that.

Id., at 11; 20a.

avoided his friends "and was humiliated and embarrassed by his financial situation and his dealings with creditors". Ultimately he declared bankruptcy and was adjudicated bankrupt in 1980.

Id. at 10; 14a-15a.

Against that factual background, the District Court entered its initial conclusions of law and compensatory damage award against defendants Beach and Davis for $4200. *Id.* at 17; 51a.

B. The District Court's Initial Conclusions of Law

The District Court canvassed the applicable due process cases with a careful exposition of the principles growing from the *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) principle that "the opportunity to be heard" is the fundamental requirement of due process of law. *Id.* at 13-14, 30a-35a.[4] It concluded:

> With respect to Scherer's termination the procedures followed by defendants Beach and Davis were inadequate. The plaintiff did not have an effective opportunity to rebut the claim of conflict between his outside employment and his duties for the FHP or to dispute prior to the termination decision whether the

[4]The argument, advanced *infra*, presents the cases relied upon by the District Court and shows why they support both the applicable due process requirements and the no qualified immunity conclusion initially reached by that Court.

> pursuance of dual employment constituted cause for dismissal. Scherer was given written notice of dismissal along with notice of the stated reason. No effective opportunity to present oral or written argument to Ralph Davis or Col. Beach, the ultimate decision maker, was ever provided. Plaintiff was not offered the prompt hearing and prompt disposition of his appeal from the termination decision which is mandated by *Barry v. Barchi* and prior cases.

Id. at 14; 35-36a.

Then, in an equally careful analysis, the Court examined the applicable qualified immunity cases and concluded:

> That [qualified] immunity can be lost if the constitutional rights allegedly infringed by the defendants were "clearly established" at the time of the defendants' challenged conduct; if defendants knew or should have known of those rights and if they knew or should have known that their conduct violated the constitutional norm.

Id. at 16; 43-44a.

The District Court next re-examined the due process cases in light of that standard, and concluded:

> **Plaintiff Scherer's due process rights were clearly established at the time of his October 24, 1977 dismissal from the [Florida Highway Patrol] and defendants Beach and Davis, as**

> officials charged with the responsibility of making dismissal decisions for the Department of Highway Safety and Motor Vehicles, should have known that their failure to provide any pre-termination procedure violated plaintiff's constitutional rights.

Id. at 16; 46a.

Had the matter ended there, *Harlow v. Fitzgerald* would have counselled exactly what the District Court did—rejection of the qualified immunity claim. As we contend below, there was no need for the District Court to have retreated from its correct position, thus this case presents no conflict with *Harlow*, and the damage decision must be affirmed.

C. The District Court's Unnecessary Retreat

Shortly after issuing its opinion and judgment, the Fifth Circuit decided *Weisbrod v. Donigan*, 651 F.2d 334 (1981). The opinion rejected an attack on a Florida Civil Service termination by saying merely:

> As to the due process claims, Weisbrod offers no authority indicating the failure to hold a pretermination hearing and the delay in or the process of her administration were clear violations of her constitutional rights.

Id. at 336.

As we discuss in our argument, *infra*, the District Court felt it necessary to retreat from its prior, considered opinion, and conclude that *Weisbrod* stood for the

proposition that no clearly established constitutional provisions had been violated by defendants Beach and Davis. *Id.* at 19; 66a. Therefore it fell back upon the violation of a Departmental regulation requiring an administrative process resembling due process procedures, as its basis for rejecting the defendant's qualified immunity claim. *Id.* at 19; 67a.

The defendants and the Solicitor General now seize upon the District Court's amended rationale as a violation of *Harlow*. But as we set forth below, the issue they present is hollow, for the District Court need not have retreated in the face of *Weisbrod*, since its initial conclusions of law were correct.

SUMMARY OF ARGUMENT

I

The failure to provide Appellee Scherer with any opportunity to be heard between the time his supervisor recommended a three-day suspension and the Highway Patrol Director fired him, denied Scherer the clearly established right to due process of law to which he was entitled at the time of his termination. The District Court's initial holding to that effect was correct. Thus the damage award was consistent with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

By 1972 this Court had established the due process right to be heard prior to the taking of a person's property. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971). Government employees with entitlement to continued employment had a right to some kind of opportunity to be heard prior to their termination. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972). The Fifth Circuit, which at the time encompassed Florida within its jurisdiction, had established the need for specific pre-termination due process in career service firings. *Thurston v. Dekle*, 531 F.2d 1264 (5th Cir. 1976), vacated on other grounds, 438 U.S. 901 (1978). The Florida Attorney General had participated as *amicus curiae* in that case, and had issued a 1975 Attorney General's Opinion confirming the State's commitment to due process for career service employees.

Thus, clearly established law required that before making the decision to fire Scherer, defendant Beach,

the Highway Patrol Director, and Davis, the Department of Highway and Motor Vehicles Director, should have provided him with an opportunity to be heard. Their failure to do so in light of clearly established principles vitiated their claim to qualified immunity. The 1981 Fifth Circuit decision in *Weisbrod v. Donigan*, 651 F.2d 334, provided no principled basis for retreating from the previously established due process requirements, nor, if it did sound some sort of retreat, should its 1981 emanations excuse constitutional misconduct which occurred in 1977.

Clearly established constitutional principles were also violated by firing Scherer while, at the same time, two other Highway Patrol officers were allowed to continue with their parttime employment in the same job which prompted Scherer's dismissal.

Therefore, the District Court's decision can be upheld without posing any *Harlow v. Fitzgerald* problem.

II.

Harlow v. Fitzgerald and its antecedents focus on the need to protect officials exercising discretionary functions from the chilling effect of damage suits.

In this case, the defendants were performing a non-discretionary duty to enforce a stated personnel policy. While they had discretion as to what, if any, sanction to impose, there was no discretion, once informed of a violation of Departmental regulations; a complete investigation had to be ordered as a prelude to making the termination decision.

Since the obligation to conduct a pre-termination inquiry was not discretionary, *Harlow's* concerns for government officials' decision making flexibility has no force in this case. Where, as here, established (as opposed to "clearly" established) constitutional doctrines are paralleled by state regulations providing similar due process protection, failure to follow both of the parallel courses constitutes "such disregard for established law that [the] conduct 'cannot reasonably be characterized as being in good faith' ". *Harlow*, 457 U.S. at 819 n. 33, quoting *Procunier v. Navarette*, 434 U.S. at 565.

This test would, like *Harlow*, obviate any need for determining subjective good faith, permitting the immunity issue for officials performing non-discretionary functions to be decided on summary judgment.

Since the damage award in this case is consistent with the proper test for determining qualified immunity in a non-discretionary setting, the decision below must be affirmed.

III.

The appellee agrees that there is no case or controversy with regard to the portion of the judgment declaring unconstitutional a 1981 statute concerned with career service post-termination proceedings. Therefore, that portion of the decision below should be vacated, and there is no authority under 28 U.S.C. §1254(2) to reach any other federal question presented by the defendants.

ARGUMENT

I

THE DEFENDANTS' TERMINATION OF GREGORY SCHERER'S EMPLOYMENT VIOLATED HIS CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS. THEREFORE THE AWARD OF DAMAGES IS CONSISTENT WITH *HARLOW V. FITZGERALD*, 457 U.S. 800 (1982).

Gregory Scott Scherer's Amended Complaint alleged that his termination from State employment violated his Fourteenth Amendment procedural due process rights because he was not accorded a prior hearing or a reasonably timed subsequent hearing (J.App. 12-16).

The District Court's initial opinion concluded that Scherer's constitutional right to "pre-termination procedures was clearly established" at the time of his discharge (J.S.App. at 30a-39a; 45a).

The Court vacated its due process decision in light of *Weisbrod v. Donigan*, 651 F.2d 334 (5th Cir. 1981), believing that case mandated a retreat from the constitutional basis originally asserted. The Amended Order utilized the violation of a Highway Patrol regulation as the basis for finding in favor of Scherer and awarding him damages (J.S.App. 69a-70a).

In response to the defendants' appeal to the Eleventh Circuit, Scherer continued to assert the validity of his federal due process claims. His Brief argued:

> The Defendants should have known that a mere post termination evidentiary hearing, without more, is insufficient.
>
> In 1972 the Supreme Court held that an employee who had an objective expectancy to continued employment had a right to a hearing prior to the termination of that employment.
>
> Appellee's Eleventh Circuit Brief, p. 31.

The defendants and the Solicitor General assume that the Eleventh Circuit's silent affirmance of the District Court permits the assumption that this case may only be viewed through the "violation of an administrative regulation" prism they present. That is not the case. The record, and the controlling legal principles, compel the conclusion that the defendants did violate Gregory Scott Scherer's clearly established constitutional rights and there is no immunity impediment to the $4200 damage award made by the District Court.

A. The Constitutional Due Process Principles Established at the Time of Scherer's Termination Required a Prior Hearing

Scherer was discharged in October, 1977. He had a protected property interest in his employment (J.App. 41). He was not provided formal pre-termination notice or an opportunity to complain (J.S. 7a-10a). By 1972, this Court had established the due process right to a hearing prior to the taking of one's property. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Goldberg*

v. Kelly, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969).

In the context of governmental employment, the Court had established that an employee with an entitlement to continued employment had a right to a hearing prior to the termination of that employment. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972).

Roth's lesson was unambiguous: "When protected interests are implicated, the right to some kind of hearing is paramount". 408 U.S. at 506-07. A footnote to that statement underscored its firmness:

> Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." . . . "[T]he Due Process Clause . . . must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective." . . . For the rare and extraordinary situation in which we have held that deprivation of a protected interest need not be preceeded by some kind of a hearing, see. . . .
>
> *Id.*, 408 U.S. at 570, n. 7. (emphasis in original; citations omitted).

The defendants may contend that the pre-termination conversations between Scherer and his immediate

superiors were sufficient. They would be wrong. The only meaningful moment for an opportunity to be heard would have been in the twelve days between October 12, 1977, when Scherer's supervisor recommended a three-day suspension (Plaintiff's Composite Exhibit 1, p. 106), and defendant Beach, on October 24, 1972, fired him. *Id.* at 107. The right to be heard offers meaningful protection only if one knows the loss which might be imposed. Although a sergeant and a lieutenant had suggested termination to the Troop Captain, *id.* at 97-98, the Captain's October 12 recommendation to Beach only put Scherer on notice of a three-day suspension. The due process cases focus on some right to be heard before facing a grievous loss. Only Beach could have provided that opportunity here, because he dictated the loss. Instead, he provided nothing except the letter telling Scherer he was fired. *Id.* at 107.

Matthews v. Eldridge, 424 U.S. 319 (1976), found due process to be satisfied where, prior to recommended termination of benefits, a disability claimant was "informed that benefits may be terminated, provided a summary of the evidence upon which the proposed determination to terminate is based, . . . afforded an opportunity to review the medical reports and other evidence in the case file [and] respond in writing and submit additional evidence." *Id.* at 338.

In *Goss v. Lopez*, 419 U.S. 565 (1975), students suspended for 10 days were held to be constitutionally entitled to due process protection:

> [R]equiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge

> against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect.

Id., 419 U.S. at 583-84.

Florida state officials were not unaware of these legal principles. The Florida Attorney General was the named defendant in *Fuentes v. Shevin, supra.* He appeared as *amicus curiae* in *Thurston v. Dekle*, 531 F.2d 1264 (5th Cir. 1976), vacated on other grounds, 438 U.S. 901 (1978), in which the Jacksonville Florida Civil Service Board was held to this due process standard:

> Where a governmental employer chooses to postpone the opportunity of a non-probationary employee to secure a full-evidentiary hearing until after dismissal, risk reducing procedures must be accorded. These must include prior to termination written notice of the reasons for termination and an effective opportunity to rebut those reasons. Effective rebuttal must give the employee the right to respond in writing to the charges made and to respond orally before the official charged with the responsibility of making the termination decision.

Id., 531 F.2d at 1273 (footnotes omitted).

Thurston was consistent with the due process protections held to be sufficient in *Arnett v. Kennedy*, 416 U.S. 134 (1974), a federal Civil Service case:

> The affected employee is provided with 30 days' advance written notice of the reasons for his proposed discharge and the materials on which the notice is based. He is accorded the right to respond to the charges both orally and in writing, including the submission of affidavits. Upon request, he is entitled to an opportunity to appear personally before the official having the authority to make or recommend the final decision. Although an evidentiary hearing is not held, the employee may make any representations he believes relevant to his case. After removal, the employee receives a full evidentiary hearing, and is awarded backpay if reinstated. See 5 CFR §§771.208 and 772.305; 5 U.S.C. §5596. These procedures minimize the risk of error in the initial removal decision and provide for compensation for the affected employee should that decision eventually prove wrongful.

Id., 416 U.S. at 170 (Powell, J., concurring).

The Attorney General of Florida had stated his commitment to due process for State career service employees in a 1975 opinion:

> Career service employees who have attained permanent status in the career service system have acquired a property interest in their public positions and emoluments thereof—such as job security and seniority which they may not be deprived of without due process of law.

Florida Attorney General's Opinions 075-94 (1975).

The Florida Highway Patrol September 1, 1977 Regulation which formed the basis of the District Court's Amended Judgment was a step in the due process direction mandated by the developed constitutional principles. It required:

> Upon receiving a report of . . . a violation of Department or Division rules and regulations . . . the Director shall order a complete investigation to determine the true facts concerning the circumstances surrounding the alleged offense. The completed investigation report will also contain a written statement made by the employee against whom the complaint was made. If after a thorough study of all information concerning the violation, the Director decides that a . . . dismissal will be in order, he will present the employee in writing with the reason or reasons for such actions.
>
> (J. S.App.69a).

Thus, the regulation was an attempt to make State action consonant with due process principles. Applied here, it would have put Scherer on *some* notice of the possible dire consequences facing him. In the context of this case, the Solicitor General's concern that official willingness to provide protections which exceed "current constitutional boundaries" may be "chill[ed]" (Brief of United States at 24), is without foundation. The regulation here endeavored to approach, not surpass clearly established constitutional law. The District Court could have properly rested its analysis on its initial opinion; reliance on the regulation was superfluous.

The District Court's deference to the then just decided *Weisbrod v. Doniga, supra*, which prompted its use of the Regulation, is difficult to explain. Weisbrod was fired from State employ after addressing a police officer with a profanity. She claimed both First Amendment and procedural due process protection. The former was rejected. The case's sole contribution to due process analysis is this sentence:

> As to the due process claims, *Weisbrod offers no authority* indicating the failure to hold a pretermination hearing and the delay in the process of her administrative appeal were clear violations of her constitutional rights.

Id., 651 F.2d at 336 (emphasis supplied).

The District Court must have simply felt obliged to follow the last opaque word from the appellate circuit. The Court grasped for some palatable explanation in light of *Thurston v. Dekle* and all the cases which had preceded that decision, none of which were even mentioned in *Weisbrod*. But, based solely on inferences drawn from *Weisbrod*'s passing references to due process, the District Court struck a new, non-constitutional course for its decision. That new tack was unnecessary. The clearly established constitutional route initially chosen by the Court (J.S.App.44a-46a) was well charted and need not have been discarded. Certainly, given the state of 1977 law, *Weisbrod*'s 1981 emanations should not have dictated the duties which were clearly owed to Scherer when he was fired in 1977. To conclude otherwise would allow public officials to escape constitutional duties by speculating on the future course of constitutional law: if Fourteenth Amendment

protections remain unchanged, or increase, the officials lose money; if those protections decrease, the officials profit by their prescience.

In October, 1977, Gregory Scott Scherer was constitutionally entitled to *some* prior opportunity to be heard. He received none. Therefore the defendants had no claim to immunity from damages under any construction of *Harlow v. Fitzgerald.*

B. The Constitutional Due Process Principles Established at the Time of Scherer's Termination Which Required a Subsequent Full Hearing Within a Reasonable Time of the Decision to Terminate His Employment, Underscored the Obligation to Provide Some Proper Pre-termination Protection.

The absence of *any* prior due process protection before being notified of his firing, combined with the 9 month delay in providing Scherer's opportunity for a subsequent hearing, makes the lack of pre-termination due process protection an inescapable violation of clearly established due process principles.[5]

Citing cases back to 1914, *Matthews v. Eldridge, supra*, said:

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[5]Scherer's case was not an exception. Testimony showed that from July, 1978 to February 1979, the average time between acceptance of an appeal and a civil service hearing ranged from 162.3 days (October, 1978) to 357 days (December, 1978). (ROA, Vol.4, Tr. at 14-18).

> This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest.

Id., 424 U.S. at 333.

By 1976 it was clear that the Constitution would not tolerate a serious delay in providing a due process hearing.

Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), upheld a Louisiana sequestration statute against a prior hearing due process attack because, among other reasons, Louisiana law provided for an immediate post taking hearing. Justice Powell surveyed the pertinent due process protection offered by the Louisiana Statute, including its provision that

> An opportunity for an adversary hearing must then be accorded promptly after sequestration to determine the merits of the controversy, with the burden of proof on the creditor.

Id., 416 U.S. at 625 (Powell, J., concurring).

In *Arnett v. Kennedy, supra*, the Court approved an extensive pre-termination informal process, combined with a post-termination full hearing. The Court assumed that "some delay" always attends full use of formal hearing procedures, and found no specific due process fault with Kennedy's claim that over 50% of Civil Service Commission appeals were delayed "more than three months". *Id.*, 416 U.S. at 157-58. Kennedy had not attempted to pursue such an appeal, preferring instead

to sue first, *id.* at 138, therefore his case did not present a clear issue on the parameters of promptness.

Thus while there was some authority tolerating a three month delay in post-termination appeals from discharges which accorded sufficient pre-termination due process, there was no authority supporting a total denial of any pre-termination right to be heard, followed only by a post-termination hearing nine months later.

Thurston v. Dekle, supra, left no doubt about striking the proper balance. The *Thurston* court mandated pre-termination procedures in a process which promised a full Civil Service Board hearing within no more than 30 days of the employee's discharge. *Id.*, 531 F.2d at 1267, n. 2 and 3.

The 1978 decision in *Barry v. Barchi*, 443 U.S. 55, confirms the clearly established status of pre-1977 law on this subject. Finding no fault with New York's pre-suspension procedures, the Court relied solely on the general principal that an opportunity to be heard must be "at a meaningful time and in a meaningful manner" to conclude:

> We also discern little or no state interest, and the State has suggested none, in an appreciable delay in going forward with a full hearing. On the contrary, it would seem as much in the State's interest as Barchi's to have an early and reliable determination with respect to the integrity of those participating in state supervised horse racing.

> In these circumstances it was necessary that Barchi be assured a prompt post-suspension hearing, one that would proceed and be concluded without appreciable delay.

Id., 443 U.S. at 66.

The ease with which the Court arrived at the promptness requirement for *Barchi*, and the litany of pre-1977 due process cases which had articulated the need for a prior hearing, or the need for a speedy post-deprivation hearing combined with some pre-taking protections, leaves no doubt that clearly established due process rights were denied Scherer by the defendants' pre-termination failure to accord him "the right to some kind of prior hearing". *Board of Regents v. Roth*, *supra* at 569-570.

C. The Disparate Treatment of Gregory Scherer Violated His Clearly Established Constitutional Rights.

Scherer's Amended Complaint alleged his termination violated the Fourteenth Amendment by being arbitrary and capricious. (J.App.15-16). A joint stipulation reflected that two Florida Highway Patrol troopers in Scherer's Troop were also employed as security officers on movie sets, in addition to their Highway Patrol employment. The stipulation agreed that they, like Scherer, were subject to the same dual employment regulations and that they, like Scherer, requested and received initial approval to work on their second jobs. (J.App.64-65).

However, unlike Scherer, the "initial approval of that second employment which they [the two troopers] received was never revoked." *Id.* Therefore, they, unlike Scherer, were never terminated because of their dual employment. The District Court noted the irony, (J.S.App.54a), but did not render a judgment based on it.

This Court may uphold the judgment based on the undisputed factual record showing the denial of equal protection resulting from the disparate treatment of Scherer. This alternative equal protection ground, like the procedural due process claim, meets the clearly established constitutional right test of *Harlow.*

In 1969 the Fifth Circuit had condemned disparate treatment of similarly situated public employees. Addressing the University of Mississippi's efforts to curtail the dual employment of two law professors, the Court rejected the professors' claimed right to their outside work, but continued:

> Plaintiffs, however, do have the constitutional right to be treated by a state agency in no significantly different manner from others who are members of the same class, i.e., members of the faculty of the University of Mississippi School of Law.
>
> *Trister v. University of Mississippi*, 420 F.2d 499 (5th Cir. 1969).

Trister's equal protection lesson was reaffirmed in *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970), leading that Court to say in 1979 that the Circuit's constitutional

rule against disparate treatment was "firmly established". *Gosney v. Sonora Independent School District*, 603 F.2d 522 (5th Cir. 1979). While this trilogy involved public education, *Trister's* holding left no doubt that every state agency must subscribe to treating similarly situated persons in a similar fashion. Indeed, it is hard to find a more basic and accepted constitutional rule than the government's obligation to abide by that precept. *See, F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

Therefore, since the disparate treatment of Scherer violated his clearly established constitutional right to equal protection, the damage award may be sustained on these alternative grounds for decision.[6]

[6]Beach and Davis are responsible for the equal protection violation since the claim arises from their termination of Scherer, not their approval of the other troopers' work. Moreover, the disparity of treatment underscores the need for Beach and Davis to have followed some due process pre-termination procedures, for doing so may have alerted them to their ultimate equal protection problem.

II

THE AWARD OF DAMAGES AGAINST THE DEFENDANTS WAS CONSISTENT WITH *HARLOW V. FITZGERALD*, 457 U.S. 800 (1982)

The *Harlow v. Fitzgerald* objective standard for determining qualified immunity is premised upon this balancing of societal interests:

> The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences".

Id., 457 U.S. at 819 (citation and footnote omitted).

The concern for public officials' independence is tied to permitting such officials to freely exercise their discretionary judgment in performing their duties. *Pierson v. Ray*, 386 U.S. 547, 554 (1967). The briefs of the defendants and the United States disregard the discretionary-nondiscretionary distinction which is critical to any immunity analysis. From *Scheuer v. Rhodes*, 416 U.S. 232 (1974), through *Butz v. Economou* 438 U.S. 478

(1978), to *Harlow*, the Court has stressed the protection of discretion. *Harlow* adverted to the *Scheuer* acknowledgment that "high officials require greater protection than those with less complex discretionary responsibilities." *Id.*, 457 U.S. at 807. And *Harlow* quoted the *Butz* recognition of the "need to protect officials who are required to exercise their discretion . . ." *Id.* Thus, *Harlow* concludes:

> We therefore hold that government officials *performing discretionary functions generally are shielded* from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id., 457 U.S. at 818 (emphasis supplied).

As we demonstrate below, the defendants here were (1) not performing a discretionary function, and (2) their violation of their own regulations requires the balancing test to be struck in favor of the public interest in deterring unlawful conduct.

A. The Defendants Were Not Engaged in Discretionary Duties

The ultimate decision as to what, if any sanction should have been imposed upon Scherer was an exercise of discretion. However, once informed of Scherer's violation of Department regulations, Beach's duty was ministerial. The pertinent personnel regulation provided:

> Upon receiving a report of . . . a violation of Department or Division rules and regulations

> . . . , the Director *shall* order a complete investigation to determine the true facts concerning the circumstances surrounding the alleged offense. The completed investigation report will also contain a written statement made by the employee against whom the complaint was made. If after a thorough study of all information concerning the violation, the Director decides that a . . . dismissal will be in order, he will present the employee in writing with the reason for such actions.
>
> (J.S. App. 69a) (emphasis supplied).

Therefore, before deciding to fire Scherer, Beach was obligated to order a complete investigation.

This case does not involve Presidential aides making decisions in unstructured situations (*Harlow*); state officials formulating important policies within a broad range of discretion (*Scheuer*, at 274); federal officials deciding whether to institute an investigation and administrative proceedings (*Butz*, at 480); school board members "weighing . . . many factors and formulating long term policy" (*Wood v. Strickland*, 420 U.S. 308, 319 (1975)); or regional planning board members acting in a legislative-like capacity (*Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979)).

This case involves merely an official's action enforcing an established policy. Indeed, given an official's duty and obligation to follow mandatory agency policy, defendant Beach had no discretion or choice—he had to seek a complete investigation *after* receiving the report of Scherer's conduct. Instead, he relied upon the

informal and unedifying discussions which occurred prior to the Troop Captain's October 12, 1977 memorandum to him.[7]

Thus, unlike *Harlow* and its antecedents, the question here is whether government officials performing mandatory, non-discretionary functions are shielded from liability for civil damages insofar as their conduct violates established rights which a reasonable official would have known. The answer must be "no".

B. The Defendant's Failure to Accord Any Pre-Termination Opportunity to be Heard Was Unreasonable in Light of the Departmental Regulation Which Attempted to Offer Some Pre-Termination Due Process Protection

Once concern for inhibiting discretionary conduct is removed, deterring unlawful conduct and protecting established rights become paramount interests in the immunity analysis.

As posed by the District Court, the question was whether, having violated a Departmental regulation providing some due process, could the defendants' denial of any due process be reasonable. (J.S.App. 70a). That test, like *Harlow's*, focused upon objective legal reasonableness, and is consistent with *Harlow's* statement

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[7]As the District Court found, even Scherer's supervisor, Lt. Wiggins, did not know what conflict was posed by Scherer's dual employment. (J.S. App. 9a). Had Beach followed his duty, and ordered an investigation subsequent to receiving the Captain's report, that problem and the fact of the disparate treatment of Scherer, might have resulted in the imposition of a lesser sanction.

that "where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate . . .", 457 U.S. at 819. Indeed, *Harlow's* footnote to its hesitation doctrine provides strong support for our position. Quoting favorably from *Procunier v. Navarette*, 434 U.S. [555] at 565 [1978], the Court left open the possibility that even if a constitutional right had not been declared, clear "disregard for established law" could lead to a conclusion of unreasonableness and bad faith, thus allowing damages.[8]

In the instant case, the defendants did act in clear disregard of law established by their own regulations. The Solicitor General's expressed concern for a possible return to a pre-*Harlow* need for "an extensive analysis of the state of mind of the offending public official", or reliance upon regulations which may be "irrelevant to the wrong for which the plaintiff seeks redress", (Brief for United States at 18-19) has no force here.

To be sure, the inquiry is slightly broader than the defendants' and the Solicitor General's interpretation of *Harlow*, but that is only because we are dealing with officials who are *not exercising discretion*. Accordingly,

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[8] *See, Harlow*, 457 U.S. at 819, n. 33:

> cf. *Procunier v. Navarette, supra*, 434 U.S. at 565, quoting *Wood v. Strickland*, 420 U.S. at 322, ("Because they could not reasonably have been expected to be aware of a constitutional right that had not been declared, petitioners did not act with such disregard for established law that their conduct 'cannot reasonably be characterized as being in good faith.' ").

adopting *arguendo* the construct of the defendants, the appropriate inquiry would be modified only slightly:

> (1) Were the officials performing discretionary or non-discretionary actions?
>
> (2) Were the plaintiff's constitutional rights clearly established at the time the defendant's action occurred? [If the answer is yes, there is no immunity for either discretionary or non-discretionary actions.]
>
> (3) If the officials were performing non-discretionary actions, and plaintiff's constitutional rights were not *clearly* established, did the official violate known statutes or regulations designed to protect constitutional interests, thus rendering his conduct unreasonable?[9]

Although not setting its inquiry out in the way we have fashioned it, the District Court did use that analysis. In doing so, it remained faithful to the balancing of interests which form the foundation of the qualified immunity rules and kept faith with an objective test which *Harlow* designed in order to permit qualified immunity claims to be decided on summary judgment. *Harlow*, 457 U.S. at 818. While this case, having been decided pre-*Harlow*, could not have benefited from its Rule 56, Fed.R.Civ.P., lesson, future cases will be able to use violations of relevant statutes and regulations

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[9]Implicit in this inquiry of course is the existence of a constitutional principle, for the §1983 damage relief is aimed at violations of federal, not state law.

to decide on summary judgment whether offending officials, performing non-discretionary actions, showed "such disregard for established law that their conduct 'cannot reasonably be characterized as being in good faith' ". *Harlow, supra* at n. 33, *Procunier v. Navarette, supra.*[10]

---

[10]The defendants' attempts to minimize their violation of the regulation (Brief for Defendants at 58,n. 16) are without merit.

First, the Regulation (J.S.App.69a) would have provided Scherer with a chance to respond in light of knowledge that he faced serious consequences. The memorandum to Beach which led to termination recommended a "three day" suspension. Plaintiff's Composite Exhibit 1, p. 106. It did not include any response from Scherer. The Regulation provided: "The completed investigation will also contain a written statement made by the employee against whom the complaint was made." (J.S.App.69a). Scherer's brief comment that he saw no conflict was transmitted to Beach *after* the memorandum recommending a three day suspension had been sent, Composite Exhibit at 100, 102. Had Beach, following the Regulation, ordered a complete investigation *after* receiving a reported violation, Scherer could have enlarged his no conflict defense and raised the issues caused by the permission given to two other Troopers to undertake similar employment. Instead of ordering an investigation, Beach fired Scherer.

Second, defendants' claim that the Regulation was invalid under Florida law because it was not properly promulgated does not excuse their non-compliance with its provisions. Until challenged, they were bound to its strictures, just as they forced Scherer's compliance with the dual employment policy, even though that was later found to be invalidly promulgated. (J.S.App.11a).

III

THERE IS NO CASE OR CONTROVERSY WITH RESPECT TO THE PORTION OF THE JUDGMENT DECLARING FLORIDA STATUTE §110.309 (1981) UNCONSTITUTIONAL

We have agreed at p. 1, *supra*, that the Court should vacate the portion of the District Court judgment declaring unconstitutional a Florida Civil Service statute which was enacted after Scherer had resigned from state service.

The District Court originally declared unconstitutional §110.061, Fla.Stat. (1977), because it failed to guarantee prompt post-termination hearings (J.S.App.50a). Scherer's rights had been determined pursuant to that statute.

The Amended Order reflected the Court's knowledge of the repeal of §110.061, (J.S.App.73a), but, presumably because its successor (§110.309(1981)) contained the same language, it was declared to be unconstitutional for the same reasons. Apparently the defendants had no objection, since their Eleventh Circuit Brief, at 39-40, n. 13, sought to defend both the old and new statutes, "since the wording is substantially the same."

However, Scherer could not, unless he re-enters state service, be affected by the 1981 statute. He had resigned in 1979, two years before its enactment. Therefore he had no controversy with regard to the 1981 statute at the time declaratory relief was given. *Golden v. Zwickler*, 394 U.S. 103, 110 (1969). Nor were

any of the possible exceptions to the mootness doctrine present here, which would have permitted a declaratory judgment despite Scherer's lack of interest in the 1981 statute. cf. *Gerstein v. Pugh*, 420 U.S. 103, 110 n. 11 (1975).

Scherer had a controversy with regard to the 1977 predecessor statute. To the extent that the District Court's original opinion declared it unconstitutional, and its successor suffers the same language, Florida officials should be on notice of their potential exposure to suit. But since the continuing controversy here involves damages arising from the lack of pre-termination due process, the repeal of the 1977 statute makes it unnecessary to address its validity.

For those reasons the Court should vacate the portion of the judgment declaring invalid §110.309, Fla.Stat. (1981).

CONCLUSION

The defendants violated Gregory Scott Scherer's clearly established constitutional rights by failing to provide him with any opportunity to be heard before his termination. Therefore the defendants cannot lay claim to any qualified immunity and the $4200 damage award must be affirmed.

If, in 1977, clearly established constitutional rights did not require some kind of an opportunity to be heard before termination of a career state employee, the combination of established constitutional law and clear violation of an administrative regulation seeking to protect an employee's due process rights, rendered these defendants liable in damages for their unreasonable violation of established rights.

In either event, the damage portion of the judgment below should be affirmed.

Respectfully submitted,

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Case No. 83-490

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

RALPH DAVIS, individually, CHESTER BLAKEMORE, officially as the Director of the Department of Highway Safety and Motor Vehicles; and J. ELDREDGE BEACH, individually and as Director of the Florida Highway Patrol, Department of Highway Safety and Motor Vehicles, Appellants,

v.

GREGORY SCOTT SCHERER, Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

APPELLANTS' REPLY BRIEF

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APPELLANTS WERE ENGAGED IN DISCRETIONARY DUTY

Appellee argues that the Appellants, in failing to follow a departmental regulation, were divested of discretion to terminate this employee. The ultimate issue of whether to terminate this employee, based upon the facts presented to them, indicate the highest form of discretion necessary. To "fire" an employee is but a portion of the overall discretion possessed by the Defendants in exercising their disciplinary authority. Here, the Appellants substantially complied with the requirements of General Order 43. There was an "investigation" with notice to the Appellee. There was an opportunity for him to be heard and for the Appellants to consider his response. (6a - 9a) The Appellants knew that the Appellee's superiors had advised that a potential conflict

existed, ordered him to cease his secondary employment and that Scherer refused to quit his second job. When presented with those already ascertained facts, the Appellants exercised their discretion to terminate this insubordinate employee.

The finding that the Appellants are liable for damages because they failed to abide by their own regulations, after finding that there was no violation of any clearly established constitutional right, amounts to a finding of "administrative negligence" which "fails to state a claim cognizable under Section 1983" and which was condemned by this Court in Polk County v. Dodson, 454 U.S. 312 (1981). Furthermore, under Harlow v. Fitzgerald,457 U.S. 800 (1982) and Pennhurst State School and Hospital, et al. v. Terri Lee Halderman, et al., ____U.S.____ (Jan. 23, 1984), once the court determines that the actions of a

state official do not violate clearly established constitutional law, then the court is without jurisdiction to inquire further and should dismiss the Complaint. Without a finding that there was a violation of a clearly established constitutional right, subjecting the state official to a federal trial because of a failure to abide by a regulation (overlooked perhaps due to inadvertence, negligence or lack of knowledge) is contrary to Harlow and Pennhurst. Such trials could seriously "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties". Gregoire v. Biddle, 177 F.2d 579, 581 (2nd Cir. 1949), (Learned Hand, J.).

SCHERER WAS DISMISSED ACCORDING TO CLEARLY ESTABLISHED LAW

Appellee argues the case law at the time clearly established the right of a

governmental employee to pretermination procedures that were not provided to Plaintiff. This argument was first adopted (43a - 45a) and then rejected by the trial court (65a - 67a) based upon the intervening decision in Weisbrod v. Donigan, 651 F.2d 334 (5th Cir. 1981) which held that no clear constitutional right to a pretermination hearing existed in June, 1977.[1]

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[1]Also, the Weisbrod court determined that a wait of nine months for a full evidentiary hearing did not contravene any well established constitutional principles. Id. Appellee's brief (p. 20) expresses bewilderment over the trial court's adoption of Weisbrod as controlling without a discussion of the pertinent case law. The implication being that the case authority supporting the Plaintiff's position, particularly Thurston v. Dekle, 531 F.2d 1264 (5th Cir. 1976), was not presented to the Weisbrod panel. In suggesting this interpretation of Weisbrod, counsel for Appellee is being disingenous. The law firm representing the Appellee here, Patterson and Traynham, also represented the Plaintiff in Weisbrod and knows that Thurston v. Dekle, as well as other cases, were submitted as authority for the Plaintiff's procedural

The conclusion from Weisbrod is that the Fifth Circuit did not consider Thurston v. Dekle as unequivocally establishing a constitutional right to a pretermination hearing in 1977. This reasoning is sound since Thurston v. Dekle was on petition for certiorori to this court until June 26, 1978.[2]

Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972) and other cases cited by Appellee only require that "some kind of a hearing" must be provided prior to depriving a person of a protectable property interest. Roth, supra

due process contentions in Weisbrod. See Principal Brief of Appellant at 27-28, and Reply Brief of Appellant at 8-10, Weisbrod v. Donigan, supra. Also, the trial court in Weisbrod had considered and expressly rejected the argument that Thurston clearly established the law. (66a)

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[2]This Court reversed on other grounds and remanded the case to the Fifth Circuit. 438 U.S. 901 (1978)

at 570, emphasis supplied. None specify what form of hearing is required. The Roth court expressly noted that:

> The formality and procedural requisits for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.

Id. at 571 n.8. The plurality opinion in Arnett v. Kennedy, 416 U.S. 134 (1974), indicated that:

> The nature of a [government employee's] interests in continued...employment is necessarily defined and limited by the statutory procedures for discharge and that the constitutional guarantee of procedural due process accords...no procedural protections...other than those expressly provided in the statute.

Id. at 166, Powell concurring in part. Thus, Arnett certainly cannot be interpreted as clearly establishing the law in the area.

In the instant case, there is no question that Scherer had notice of the charge

against him -- dual employment without permission and his insubordinate refusal to quit the second job -- during the thirty days between the date of his employer's denial of his request and the termination letter. (6a - 9a) Scherer responded to the charge through the chain of command both verbally and in writing. (Id.) In response to the statement of his Sergeant that he might be fired if he did not quit the job with the Sheriff, Scherer responded "I told him to fire me." (T. 75-76) Thus, Plaintiff received a "form of" pretermination hearing.[3] The manner in which Scherer's dismissal was carried out, therefore, was not contrary to any settled law regarding pretermination procedures.

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[3]This sort of informal counseling has been deemed to comport with due process. See Webb v. Dillon, 493 F.2d 656 (5th Cir. 1979).

EQUAL PROTECTION

Appellee argues that termination of Scherer's employment violated well-established equal protection principles. There was no mention of an equal protection claim and nor did the trial court rule on, or mention, this issue. This Court's Rule 10.5,[4] (which formalizes prior accepted practice allowing an appellee to argue alternative grounds for the judgment below, 13 Moore's Federal Practice, ¶810.04 (2d.Ed. 1982)), and Court Rule 15.1(a) do not authorize Appellee's equal protection argument.

> "It is the general rule ... that [the Court] does not consider an issue not passed upon below....[T]his is essential in order that parties may have the op-

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[4] "An appellee ... may defend a judgment on any ground that the law and record permit and that would not expand the relief he has been granted."

> portunity to offer all the evidence they believe relevant to the issues ....

Singleton v. Wulff, 428 U.S. 106, 120 (1976).

As an exception to that general rule, an appellee in this Court is permitted to argue in support of his judgment issues which the lower courts did not rule on; however the ground must have been "properly raised below." Washington v. Yakima Indian Nation, 493 U.S. 463, 476 n.20 (1979); See, Tennessee v. Dunlap, 426 U.S. 312, 314 n.2 and 316 n.3 (1976). Here, the equal protection claim was not raised at any time in the proceedings below and should not be heard here.

Furthermore, the equal protection claim does not qualify as an alternative argument in support of the judgment below which would not modify that judgment. If the judgment appealed from would be altered by

adopting Appellee's argument, such an argument is barred from consideration absent a cross-appeal.[5] In the words of Mr. Justice Brandeis:

> Appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary,...to supplement the decree with respect to a matter not dealt with below.

United States v. American Railways Express Company, 265 U.S. 425, 435 (1924). This court has rejected the theory that the "judgment" consists of simply the sum of money awarded without reference to the basis for that award. See Helvering v. Pfeiffer, 302 U.S. 247, 250-251 (1937); see F. Duriso v. K-Mart No. 4195, 559 F.2d 1274

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[5]Barry v. Barchi, 443 U.S. 55, 69 n.1 (1978); FEA v. Algonquin SNG Inc., 426 U.S. 548, 560 n.11 (1976); Mills v. Electric Auto-Lite Company, 396 U.S. 375, 381 n.4 (1970).

(5th Cir. 1977). The judgment below awarded Scherer damages because certain departmental procedures were not followed in firing him and not because of any violation of clearly established constitutional right.

If this Court were to discount the fact that Appellant's have not had a fair opportunity to defend against an equal protection claim, and proceed to weigh the evidence and adjudicate the cause of action, the only reasonable conclusion would be that no equal protection violation appears. Equal protection is not implicated unless the alleged discriminatory treatment is "patently arbitrary and bears no rational relationship to a legitimate governmental interest." Frontiero v. Richardson, 411 U.S. 677, 683 (1973). Appellee's equal protection argument derives from the fact that two officers in his troop were permitted to work the same type of second

employment that he was fired for doing. The significant difference between Scherer and those two officers was in their job classification. Scherer was one of a small number of radio operators in the troop. (T. vol. I 65-66) The other officers were troopers, of which there were many. (Id.) It was potentially much more disruptive to the troop for a radio dispatcher to be called away unexpectedly[6] because his position is so vital to the area law enforcement and public safety network and yet there were few dispatchers to call upon to fill the slot. More importantly, the Highway Patrol had little discretion to disallow the two officers

---

[6]It was felt that with a second law enforcement job there was a substantial likelihood of the employee being subpoenaed and not able to work his assigned shift. (T. vol. I 217, T. vol. II 47, 56, 60, 61)

from working for the Sheriff as troopers enjoyed a right, established by collective bargaining contract, to work in other law enforcement positions. (T. vol. I 172, vol. II 101-102) No such provision applied to radio dispatchers. (T. vol. I 67, vol. II 101-102) Clearly then, there was a rational basis for the complained of differential treatment and, consequently, Scherer's rights under the Equal Protection Clause were not infringed.

It would expand that judgment for this Court to now hold, as Appellee asks, that the Highway Patrol's decision to deny Scherer permission to take a second job as a reserve deputy was a violation of equal protection. As a consequence, this Court should decline to delve into the factual and legal disputes of the equal protection issue.

THIS COURT HAS JURISDICTION TO DECIDE ALL FEDERAL QUESTIONS

Title 28 U.S.C. §1254(2) authorizes this Court to hear "the Federal questions presented" on appeal by these Appellants, since they are "relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution . . ." 28 U.S.C. §1254(2); Silkwood v. Kerr-McGee Corp., ____U.S.____, No. 81-2159 (Jan. 11, 1984), slip op. 7.

Once jurisdiction exists under 28 U.S.C. §1254(2), this Court may consider other pertinent "Federal questions" as was done in Abood v. Detroit Board of Education, 431 U.S. 209, 216, n.9 (1977) in intrepreting 28 U.S.C. §1257(c) and an appeal from a state court. Should the appeal be disposed of under §1254(2), the remain-

ing federal issues may be considered under 28 U.S.C. §2103.[7]

CONCLUSION

For the reasons delinated in the Appellant's initial brief, which have not been rebutted by Appellee, and for the reasons addressed in this Reply, the Court should find for the Appellants and reverse the finding that Appellant's actions authorize an award of damages against these state officials and rule that, absent a federal constitutional or statutory violation which must be protected, the District

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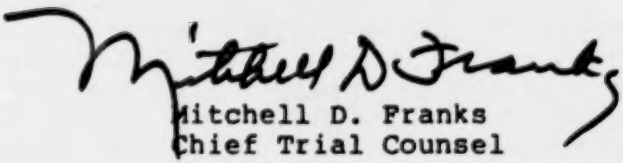
[7] Silkwood v. Kerr-McGee Corp., supra; Perry Education Ass'n v. Perry Local Educators' Ass'n, ____U.S.____, 74 L.Ed.2d 794, 803-804 (1983); El Paso v. Simmons, 379 U.S. 497, 501-503 (1965).

Court had no jurisdiction to inquire further.

Respectfully submitted,

JIM SMITH
Attorney General



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF APPELLANTS has been furnished by U.S. Mail to Ben R. Patterson, 1215 Thomasville Road, Post Office Box 4289, Tallahassee, Florida 32303 and to Bruce S. Rogow, Nova University Law Center, 3100 S.W. 9th Avenue, Fort Lauderdale, Florida 33315, this 4th day of April, 1984.

Mitchell D. Franks

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No. 83-490

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RALPH DAVIS, ET AL.,
Appellants,

v.

GREGORY SCOTT SCHERER,
Appellee.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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March 19, 1984

QUESTION PRESENTED FOR REVIEW

The American Civil Liberties Union will address the following question:

> Is a public official entitled to qualified immunity from damages in an action under 42 U.S.C. § 1983, when the official violates a statute or regulation that clearly requires certain action, and by the same conduct also violates a constitutional right that was not clearly established at the time?

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On Appeal from the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE IN SUPPORT OF APPELLEE

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union ("ACLU") is a nonpartisan, nonprofit membership organization dedicated to the protection of civil liberties through a vigorous defense of the fundamental principles embodied in the Bill of Rights. The ACLU has frequently appeared in this Court and in other courts, as counsel for a party and as an *amicus curiae*, in cases raising due process challenges to federal and state governmental actions that constrict personal liberty.

This case concerns the circumstances under which a person who has been injured by a violation of his consti-

tutional rights by a state government official may recover money damages under 42 U.S.C. § 1983. The courts below held that where the government official fails to obey state regulations that require certain conduct and the official's breach is later held to violate the Constitution, the official is not entitled to qualified "good faith" immunity. That holding is correct and sensible. Reversal of the lower courts—as the United States in an *amicus* role urges—would mark a significant departure from the Court's prior decisions that accord immunity only for discretionary activities and for actions taken in good faith, as determined by an objective standard. In short, reversal would significantly curtail the right of persons seeking redress for constitutional violations with consequences far beyond this particular case. For that reason, the ACLU urges this Court to affirm.[1]

STATEMENT

Summary of Facts

Appellee Gregory Scott Scherer formerly was a career employee of the Florida Highway Patrol. (J.S. 3a) An agency policy required approval of outside employment to avoid conflicts of interest. (J.S. 4a) Early in September 1977 Mr. Scherer received written permission to accept a parttime second job as a reserve deputy for a county sheriff's office. He was told that the permission would be rescinded if the parttime employment should interfere with his duties as a radio operator for the Florida Highway Patrol or create a conflict of interest. (J.S. 5a) Relying on this permission, Mr. Scherer bought a uniform and pistol and began work as a reserve deputy. (J.S. 5a) Several weeks later the Highway Patrol rescinded its authorization of Mr. Scherer's parttime employment, without stating how the job interfered with his duties or created a conflict of interest. (J.S. 6a)

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[1] The parties have consented to our filing this brief. Their letters of consent have been filed with the Clerk.

When his immediate superiors requested that he resign from his employment as a reserve deputy, Mr. Scherer responded that he had invested too much money in uniforms to give up his parttime work. (J.S. 6a-7a) Mr. Scherer also explained that he believed there was no reason for him to resign his position as a reserve deputy because it did not interfere with his work for the Highway Patrol. (J.S. 7a)

Mr. Scherer's immediate superiors then referred the matter to appellant Eldredge Beach, the Director of the Highway Patrol. (J.S. 7a-8a) By a letter dated October 24, 1977, signed by Mr. Beach and approved by appellant Ralph Davis (at that time the Executive Director of the Department of Highway Safety and Motor Vehicles), Mr. Scherer was terminated from his employment with the Highway Patrol effective October 20, 1977. (J.S. 9a)

Mr. Beach and Mr. Davis dismissed Mr. Scherer without giving him notice of the proposed discharge, informing him how his outside employment violated departmental regulations, or providing him an opportunity to respond to Mr. Beach, the official responsible for making the decision. (J.S. 9a) In doing so, Messrs. Beach and Davis violated a departmental regulation, General Order No. 43, that specified the procedures to be followed before dismissing an employee because of violations of departmental rules.[2] (J.S. 79a) That regulation, which had been prom-

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[2] The regulation reads, in pertinent part, as follows:

> Upon receiving a report of . . . a violation of Department or Division rules and regulations . . ., the Director *shall* order a complete investigation to determine the true facts concerning the circumstances surrounding the alleged offense. The completed investigation report *will* also contain a written statement made *by* the employee against whom the complaint was made. If after a thorough study of all information concerning the violation, the Director decides that a . . . dismissal will be in order, he *will* present the employee in writing with the reason or reasons for such actions.

(J.S. 69a) (emphasis added).

ulgated on September 1, 1977, requires the Director of the Florida Highway Patrol to order a complete investigation of the circumstances of an alleged violation, to obtain a written statement of the employee against whom the complaint is made, and, if the Director decides to dismiss the employee after review of the investigation report and the employee's statement, to explain in writing to the employee the reason for the action.

After receiving the termination letter, Mr. Scherer filed an administrative appeal of the dismissal. He also instituted a separate administrative challenge to the dual employment rule. Before a hearing on the dismissal was held, the dual employment regulation was invalidated. (J.S. 11a) The Highway Patrol then agreed to reinstate Mr. Scherer with partial back pay. (J.S. 13a-14a) In January 1979, he resigned from the Highway Patrol to accept another job. (J.S. 22a-23a)

The Proceedings Below

On June 1, 1979, Mr. Scherer brought suit under 42 U.S.C. § 1983 against Mr. Davis, Mr. Beach, and Chester Blakemore, the present Executive Director of the Department of Highway Safety and Motor Vehicles. Mr. Scherer requested a declaratory judgment that the procedures by which appellants terminated him constituted a denial of due process in violation of the Fourteenth Amendment. Mr. Scherer also sought money damages.

On July 15, 1981, the District Court for the Northern District of Florida held that the statute and implementing rules governing pre-termination and post-termination procedures at the time of Mr. Scherer's dismissal were unconstitutional because they failed to safeguard an employee's property and liberty interests in his employment. In particular, the court concluded that Mr. Scherer "did not have an effective opportunity to rebut the claim of conflict between his outside employment and his duties for the FHP or to dispute prior to the termination deci-

sion whether the pursuance of dual employment constituted cause for dismissal." (J.S. 35a) The Court found that Messrs. Davis and Beach were not entitled to assert a "good faith" immunity defense against liability for damages, because the law concerning pre-termination procedural due process was settled by the time of their dismissal of Mr. Scherer. (J.S. 46a) Accordingly, the court awarded Mr. Scherer $4,200 in compensatory damages.[3] The appellants' violation of the procedures specified in General Order No. 43 was not raised or addressed by the district court in its July 15, 1981 Memorandum Opinion and Order.

Five days after the district court issued its decision, the Fifth Circuit decided *Weisbrod v. Donigan*, 651 F.2d 334 (5th Cir. 1981), holding that pre-termination procedures for state employees required by due process were not clearly established until late 1978. Upon reconsideration of the July 15, 1981 decision in this case in light of *Weisbrod*, the district court vacated its determination that Messrs. Davis and Beach were not entitled to qualified immunity because they violated clearly established constitutional standards. The court nevertheless concluded that the appellants lost their immunity by violating their own departmental regulation governing pre-termination procedures. On that basis, the court found that "their belief in the legality of the challenged conduct was unreasonable." (J.S. 70a) The damages award of $4,200, therefore, was allowed to stand.

The Eleventh Circuit affirmed the judgment of the district court on the basis of the district court's opinion. (J.S. 83a-84a)

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[3] The court based this award on the physical and mental pain and suffering, including the humiliation and embarrassment of losing a job and having trouble with creditors, that the court found Mr. Scherer suffered during his 42 weeks of unemployment between October 1977 and August 1978, when he was reinstated. (J.S. 14a-15a & 47a-48a) The court also awarded exemplary damages but that award was vacated upon reconsideration. (J.S. 72a)

SUMMARY OF ARGUMENT

This case poses the question whether a public official is entitled to qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), when he violates clearly established statutory or regulatory provisions and, by the same conduct, also violates constitutional rights that were not clearly established at the time.[4] For the following reasons, *Harlow* and the balance of policies underlying the doctrine of qualified immunity dictate that immunity be denied in such circumstances.

First, qualified immunity protects only discretionary conduct. Because qualified immunity is designed to encourage the vigorous exercise of discretion without unduly denying redress to persons whose constitutional rights have been violated, the Court has not extended immunity to conduct not involving the exercise of discretion. Where, as here, a statute or regulation prescribes specific official conduct, the public official has no discretion to act otherwise. Accordingly, the purposes of immunity are not furthered by foreclosing suit against an official based on conduct in violation of applicable statutory or regulatory law.

Second, qualified immunity is available only for officials whose conduct conforms to a standard of "objective legal reasonableness." *Harlow v. Fitzgerald*, 457 U.S. at

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[4] The ACLU fully endorses appellee's position here that the constitutional due process rights at issue were clearly established in October 1977. Nevertheless, for the purpose of this brief, we will assume *arguendo* that the district court's holding on this point, after *Weisbrod*, was correct.

The ACLU will not address the question whether the district court properly held that the Florida statute governing termination procedures is unconstitutional. The ACLU agrees with appellee that this portion of the judgment below was erroneous, and that this Court should accept the appeal and summarily vacate this portion of the judgment. If the Court nevertheless decides to address the qualified immunity question, the ACLU urges the Court to affirm the judgment below insofar as it held that appellants are not entitled to qualified immunity.

819. This limitation recognizes that it is unfair to subject officials to damages actions for conduct that was at the time objectively reasonable. But conduct that contravenes statutory or regulatory law applicable to the official is not objectively reasonable or in good faith. It is not unfair to hold an official liable for actions that turn out to violate the Constitution when those very actions also violate statutes or regulations and therefore should never have been taken.

Third, the denial of immunity to an official who violates statutory or regulatory provisions is consistent with the goal, expressed in *Harlow*, of preventing insubstantial suits from proceeding to trial. A contention that well defined statutory or regulatory law directly applicable to the challenged conduct or decision has been violated raises a strictly legal question that is the same kind of inquiry as is required to determine whether the constitutional provisions allegedly violated were clearly established at the time of the official's actions. In addition, denying immunity when an official's unlawful conduct under statutory or regulatory law is also the ground for the constitutional claim will neither deter the vigorous exercise of official discretion nor discourage states from enacting regulatory measures.

ARGUMENT

GOVERNMENT OFFICIALS ARE ENTITLED TO QUALIFIED IMMUNITY ONLY WHEN PERFORMING DISCRETIONARY FUNCTIONS AND ONLY INSOFAR AS THEIR CONDUCT DOES NOT VIOLATE CLEARLY ESTABLISHED STATUTORY OR CONSTITUTIONAL RIGHTS.

A. The Qualified Immunity Defense Is Available Only For Officials Performing Discretionary Functions.

A threshold requirement for qualified immunity, both at common law and under *Harlow*, is that the challenged action must have been performed in the exercise of discretion. *See Harlow v. Fitzgerald*, 457 U.S. at 816 & 818. This requirement serves to confine the immunity defense to those circumstances where it fulfills its principal purpose: protecting the vigorous exercise of governmental discretion. Thus, the "discretionary function" requirement is an integral part of the careful balance between the protection of constitutional rights and the promotion of effective government that underlies the doctrine of qualified immunity.

In this case, it is undisputed that a departmental regulation specified the procedures that appellants were required to follow before they could lawfully terminate Mr. Scherer's employment. The regulation eliminated all discretion from the choice of pre-termination procedures—the very action that the district court held violated Mr. Scherer's constitutional rights in this suit. Thus, appellants were properly denied immunity from liability for damages under Section 1983.

1. Although the language of Section 1983 is unqualified and does not provide for any immunities, the Court has determined that Congress intended to preserve the common-law principles entitling public officials to limited immunity from liability for damages. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 421 (1976); *Tenney v. Brand-*

hove, 341 U.S. 367, 376 (1951). Thus, the Court has held that legislators, judges, and prosecutors are generally entitled to the same absolute immunity from damages liability under Section 1983 as they enjoyed at common law. *See Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutors); *Pierson v. Ray*, 386 U.S. 547 (1967) (judges); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (legislators). Where the common law did not afford immunity from damages, as in the case of municipalities, the Court has held that no immunity is available under Section 1983. *See Owen v. City of Independence*, 445 U.S. 622 (1980).

A central tenet of the common-law doctrine of official immunity is that public officials are entitled to immunity when exercising discretion, but not when their conduct is prescribed by law.[5] In determining the scope of the qualified immunity available in constitutional damages actions, the Court has adhered to the "discretionary function" limitation that existed at common law. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. at 816 & 818 (immunity shields "government officials performing discretionary functions").

2. When an official's conduct is mandatory or does not involve any substantial choice among alternatives, the interests in redressing private injury and checking official misconduct clearly outweigh the concern for the vigorous exercise of official judgment. The only appropriate judgment the official may make in such a case is to do what the applicable laws require. Accordingly, there is no ex-

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[5] *See Amy v. Supervisors*, 78 U.S. (11 Wall.) 136, 138 (1870) (immunity is unavailable for officials who fail to comply with writ of mandamus); *Teal v. Felton*, 53 U.S. (12 How.) 284 (1851) (postmaster does not exercise discretion in applying statutory postage rates); *Tracy v. Swartwout*, 35 U.S. (10 Pet.) 80 (1836). In *Tracy*, a customs collector required a bond in excess of the legal amount. The Court held that the official was not entitled to immunity, stating that "[i]t would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress." *Id.* at 95.

ercise of discretion to protect. Because the immunity of public officials from damages should be no broader than is necessary to achieve the purposes of the defense, *see Smith v. Wade*, 103 S. Ct. 1625, 1640 (1983); *Harlow v. Fitzgerald*, 457 U.S. at 811, immunity should not be granted when nondiscretionary conduct is involved.[6]

In the present case, the challenged conduct of appellants Davis and Beach did not involve any exercise of discretion. That appellants may exercise discretion in performing other duties, and may indeed have exercised discretion with respect to some aspects of the decision to terminate Mr. Scherer, is irrelevant.[7] Mr. Scherer is seek-

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[6] Early Supreme Court cases, cited by the Court in *Butz v. Economou*, 438 U.S. 478, 490-91 (1978), recognized this principle in holding federal officers liable for actions that were illegal under state law because they had acted outside their statutory authority. *See Bates v. Clark*, 95 U.S. 204 (1877); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 U.S. (1804). *See also Amy v. Supervisors*, 78 U.S. (11 Wall.) 136 (1870) (no exercise of discretion where writ of mandamus compels certain action); *Teal v. Felton*, 53 U.S. (12 How.) 284 (1851) (postmaster not exercising discretion in applying statutory postage rates). More recently, a state court held that police officers were not exercising discretion, and were therefore not entitled to immunity, when they failed to adhere to mandatory arrest provisions in a statute that identified the precise circumstances when police officers should make arrests to protect against domestic violence. *See Nearing v. Weaver*, 295 Or. 702, 670 P.2d 137, 142-43 (1983). The court explained that discretion "exists only insofar as an officer has been delegated responsibility for value judgments and policy choices among competing goals and priorities. Patently the purpose of [this statute] was to negate any discretion of that kind . . . ." 670 P.2d at 142.

[7] Similarly, the Court has stressed that it is necessary to focus on the particular act or decision that is challenged when deciding whether to grant absolute immunity for particularly sensitive functions. In *Harlow*, the Court held that, to obtain absolute immunity for a "special function," an official "must first show that the responsibilities of the office embraced a function so sensitive as to require a total shield from liability. He then must demonstrate that he was discharging the protected function when performing the act for which liability is asserted." 457 U.S. at 813 (emphasis

ing damages for the constitutionally impermissible pretermination procedures followed by the appellants, not for their actual decision to terminate his employment. Because departmental personnel rules specified the precise procedures to be followed by the appellants, they had no discretion whatsoever in that matter. Accordingly, the appellants were not entitled to immunity from the damages action brought by Mr. Scherer.

B. An Official Who Violates Well Defined Statutory Provisions Does Not Act With "Objective Legal Reasonableness" And, Accordingly, Is Not Entitled To Qualified Immunity.

In *Harlow*, this Court adopted a test for qualified immunity that "focuses on the objective legal reasonableness of an official's acts." 457 U.S. at 819. As the Court explained, "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Id.*

While the legal reasonableness of an official's conduct has generally been determined by reference to clearly established rules of constitutional law, where, as here, officials have violated clearly established statutes or regulations, directly applicable to them, their conduct cannot be deemed to be objectively reasonable. Consequently, there is no reason to insulate such conduct from a damages action under Section 1983.[8]

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added). *See also Butz v. Economou*, 438 U.S. at 513-17 (federal executive officials have absolute immunity from damages when performing adjudicative or prosecutorial functions, but only qualified immunity when performing other executive functions); *Imbler v. Pachtman*, 424 U.S. at 430-31 (leaving open question whether prosecutors are entitled to absolute immunity when they administer their offices and investigate crimes instead of initiating and conducting prosecutions).

[8] Removal of an official's immunity upon the violation of statutory or regulatory law is not tantamount, as the United States suggests

1. Under *Harlow* and the policies established in this Court's cases, an official who violates statutory or regulatory law that governs his conduct is not acting with "objective reasonableness," 457 U.S. at 818, and is not entitled to immunity. Immunity reflects a balance between the enforcement of the Constitution and laws through a damages remedy, on the one hand, and the protection of governmental efficiency and officials who act in good faith, on the other. *See Harlow v. Fitzgerald*, 457 U.S. at 814; *Owen v. City of Independence*, 445 U.S. 622, 650-53 (1980); *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). When an official acts in derogation of rules having the force of law, he does not exhibit the good faith that immunity strives in part to protect.[9] Absent good faith, it is not unfair to expose an official who has violated the Constitution to a damages action.

In the instant case, appellants breached legally binding regulations.[10] Florida Highway Patrol personnel regulations imposed on appellants a legal duty, before terminating an employee for violation of departmental rules, to investigate completely the alleged misconduct, to prepare a written report, including the employee's statement, and to provide the employee with written reasons before ter-

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in its brief as *amicus curiae* (Brief of United States at 26 n.27), to providing a damages remedy for violations of state law under the guise of an action under Section 1983. Section 1983 provides no relief for purely state law violations. To recover damages, the plaintiff must prove a violation of the "constitution or laws" of the United States. Only if the conduct that violated state law is also found to violate the Constitution will the official be liable for damages.

[9] *See King v. Higgins*, 702 F.2d 18, 21 (1st Cir. 1983); *Williams v. Treen*, 671 F.2d 892 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 762 (1983).

[10] The district court held that General Order No. 43 of the Florida Highway Patrol, the regulation violated by appellants, "was promulgated pursuant to Section 120.53(1)(a) of the Florida Statutes, *see* Chapter 15B-11.14, Florida Administrative Code, and has the effect of statutory law." (J.S. 69a)

minating the employee (J.S. 69a). In hastily firing Mr. Scherer with neither notice nor an opportunity to be heard by the relevant decisionmaker, appellants engaged in conduct that violated these regulations. The same conduct that violated these regulations (and was, therefore, objectively unreasonable) also violated the Constitution. Whether or not the constitutional right at issue was clearly established at the time, appellants' conduct was not legally reasonable. That is precisely what the district court held. As this Court put it in an analogous context, "it is not unfair to hold [appellants] liable" for violating the Constitution since they knew or should have known at the time that they were "acting outside the law," *Butz v. Economou*, 438 U.S. at 506.

2. Denying an immunity defense to an official who violates a statute or regulation and, by the same conduct, also violates constitutional requirements that were not well defined at the time will not require public officials "to predict the future course of constitutional law," *Procunier v. Navarette*, 434 U.S. at 562. By keying the immunity defense to clearly established law of which a reasonable official should be aware, whether statutory or constitutional, federal or state, public officials will have notice of the conduct necessary to avoid liability. A public official who abides by the rules governing the exercise of his authority need not fear liability for violations of previously undeclared constitutional rights. Only an official who steps outside the law applicable to his actions is exposed to damages, and the official who violates the Constitution in so doing should bear the consequences of his conduct. An official whose conduct violates law of which he reasonably should have known cannot complain if the same conduct is later made the basis of a constitutional cause of action. *See Harlow v. Fitzgerald*, 457 U.S. at 819.

C. The Denial of Qualified Immunity Upon The Violation Of Clearly Established Statutory Provisions Will Not Lead To Insubstantial Lawsuits Proceeding To Trial, Deter The Vigorous Exercise Of Official Discretion, Or Discourage States From Enacting Prophylactic Measures.

Harlow establishes that the qualified immunity defense should raise legal questions that can be resolved by a court without the need for extensive discovery or trial. 457 U.S. at 816-17. Consideration of statutory and regulatory provisions in ruling on the immunity defense is fully consistent with *Harlow*.

In ruling on the availability of immunity, a court must make two determinations. The first inquiry, which is already required under *Harlow*, is whether the challenged conduct was discretionary. 457 U.S. at 818. A relevant consideration in this inquiry is whether statutes or regulations removed all discretion from the official with respect to the challenged act or decision. Because this issue involves only a determination of the legal effects of statutes and regulations, it can be accomplished in summary judgment proceedings.

The second inquiry, reached only if the challenged conduct was discretionary, is whether the official's actions were objectively reasonable. Under *Harlow*, the reasonableness of an official's conduct is determined by reference to clearly established constitutional and statutory law. 457 U.S. at 819. If the official's conduct violates a clearly established constitutional right, it is not objectively reasonable. Similarly, if the same conduct that is alleged to have violated the Constitution also breached a clearly established statute or regulation, then the official's conduct is not objectively reasonable, and immunity should be unavailable. Both questions raise purely legal issues that can be resolved upon a motion for summary judgment.[11]

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[11] Even as to clearly established rights, *Harlow* did recognize that limited rebuttal should be available to an official who "claims

The use of applicable statutes and regulations to judge the legal reasonableness of an official's conduct will not resurrect the inquiry into subjective good faith abandoned in *Harlow*. In measuring legal reasonableness by reference to statutes and regulations, a court need only determine whether the requirements of the statute or regulation allegedly breached were clearly defined at the time and whether the same conduct that allegedly violated the statute or regulation would also constitute a violation of the Constitution. These issues require a court to decide only the state of the law. The official's subjective motivation is no more relevant to these issues than it is to the question whether the alleged conduct has violated clearly established constitutional rights.

The approach proposed here would not unduly deter the exercise of official discretion by making the violation of every statute or regulation a ground for abrogating qualified immunity, as the United States suggests. (Brief of United States at 24-27.) The United States raises the spectre of officials being forced to defend themselves in unforeseeable constitutional damages suits simply for having violated a state regulation that requires the official to fill out forms in triplicate. (Brief of United States at 19.) Under the immunity test proposed here, this problem would not arise. The conduct in violation of a statute or regulation invoked to defeat immunity must be the same conduct also alleged to violate the Constitution; the Constitution does not require notices in triplicate. By focusing on the conduct now understood to be unconstitutional, and by measuring that conduct against the state law binding on the official at the time, a court would not deny an official immunity for insubstantial or

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extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard . . . . But again, the defense would turn primarily on objective factors." 457 U.S. at 819.

trivial transgressions.[12] Conduct amounting to minor violations of law, but not giving rise to a constitutional cause of action, would be irrelevant to the inquiry.

Finally, the United States relies on a debater's point in contending that, if its position does not prevail, state legislatures and other regulatory bodies will be reluctant to enact prophylactic measures governing official conduct for fear that, were they to do so, public officials would lose the immunity to which they would otherwise be entitled if they violated such a measure. (Brief of United States at 28.) This cynical view of the legislative process should be rejected. In the real world, state legislatures and other regulatory bodies enact regulatory measures to protect the state's citizens; they expect state officials to obey these laws and regulations. It is implausible that a lawmaker or regulator who favors the enactment of a particular law or regulation would be reluctant to adopt it merely because an official who later disobeys the law or regulation (and by the same conduct also violates the Constitution) might be subject to a damages action. The short answer from the lawmaker or regulator to the public official worried about damages liability is: obey the state's laws and regulations—and the clearly established requirements of the Constitution—and you will never have to worry about liability under Section 1983.

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[12] Moreover, there is no reason to believe that, if the decisions of the courts below are affirmed, qualified people will be discouraged from pursuing public service. Officials would not be subjected to arduous trials in unsubstantiated damages actions, because most cases would be resolved on motions for summary judgment. Nor would officials be unduly hampered in the performance of their tasks, since they must in any event comply with applicable statutes and regulations. Only people who are unable to conform their behavior to applicable regulations might be deterred from pursuing a public service career; and this is no loss to the public.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court below insofar as it holds that the appellants are not entitled to qualified immunity.

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No. 83-490

In the Supreme Court of the United States

OCTOBER TERM, 1983

RALPH DAVIS, ET AL., APPELLANTS

v.

GREGORY SCOTT SCHERER

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

The United States will address the following question:

Whether the violation of an administrative regulation abrogates a government official's qualified immunity from a constitutional damages suit, even though such conduct did not violate any clearly established constitutional right of the plaintiff.

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INTEREST OF THE UNITED STATES

This case presents an important question regarding the scope of the qualified immunity generally accorded public officials in litigation brought under 42 U.S.C. 1983 and *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). The district court, in a decision that was summarily affirmed by the court of appeals (J.S. App. 85a-86a), concluded that, even though appellant state officials did not violate any clearly established due process right of appellee in terminating his employment, they must nevertheless respond in damages because of their failure to comply with state regulatory guidelines applicable to the discharge (J.S. App. 70a). Because the decision below imposes monetary liability upon appellants without a showing that they violated appellee's clearly established constitutional rights, it represents a substantial restriction of the qualified immunity that this Court has previ-

ously conferred upon public officials in constitutional damages actions.

Although this case involves the immunity of state officials under 42 U.S.C. 1983, the immunity principles developed by the Court here will be generally applicable to *Bivens* actions brought against federal officials directly under the Constitution. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 n.30 (1982). Therefore, the question whether regulatory violations divest state officials of qualified immunity in a constitutional damages action brought under 42 U.S.C. 1983 is of substantial concern to the United States.

STATEMENT

Appellee Gregory Scott Scherer is a former member of the Florida Highway Patrol (J.S. App. 3a). In October 1977 the Highway Patrol discharged him, without affording him formal pre-termination notice or opportunity to complain, for failure to obey orders to give up a second job (*id.* at 7a-10a). Appellee pursued a grievance through the Florida civil service system but, on the eve of his civil service hearing in August 1978, he reached an agreement with the Highway Patrol providing reinstatement with partial back pay (*id.* at 10a-14a). Some months later, he resigned from the Highway Patrol to take another job (*id.* at 22a-23a).

Appellee then instituted this suit for damages under 42 U.S.C. 1983 against appellants Ralph Davis and J.E. Beach, the two Highway Patrol supervisors who had approved his 1977 dismissal (J.S. App. 4a).[1] Appellee

[1] The suit also named Chester Blakemore as a defendant in his official capacity as Director of the State Department of Highway Safety and Motor Vehicles (J.S. App. 1a). In addition to damages under 42 U.S.C. 1983, appellee sought a declaratory judgment pursuant to 28 U.S.C. 1651, 2201 and 2202 that the Florida statute under which his civil service claim had been processed was violative of due process (J.S. App. 2a). In its initial decision, rendered in July 1981, the district court declared Fla. Stat. § 110.061 (1977) unconstitutional on various due process grounds (J.S. App. 50a). When the State informed the district court that the statute had

claimed that his 1977 termination did not comport with the procedural due process requirements of the Fourteenth Amendment (*id.* at 1a-2a). On July 15, 1981, the district court entered a memorandum opinion in which it concluded that appellee's due process rights had been infringed (*id.* at 30a-39a)[2] and that appellants were not entitled to qualified immunity because appellee's constitutional right to "pretermination procedures was clearly established" at the time of his discharge (*id.* at 45a). The court therefore awarded appellee $4,200 "in compensatory damages for his mental and physical pain and suffering" (*id.* at 51a).[3]

Five days after the entry of the district court's July 15 order, the Fifth Circuit decided *Weisbrod* v. *Donigan*, 651 F.2d 334, 336 (1981), which held that Florida officials "did not act in disregard of any well-settled constitutional rights" in discharging a permanent state employee in 1978 without a pre-termination conference. On motion for reconsideration, the district court concluded that *Weisbrod* required it to vacate its prior determination that appellants had terminated appellee in 1977 in violation of his clearly established due process rights (J.S. App. 66a-67a). The court nevertheless concluded that appellants were not entitled to qualified immunity because their actions contravened the provisions of a newly

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been repealed by the Florida legislature, the court entered an amended judgment declaring the newly enacted civil service statute unconstitutional (J.S. App. 80a). The United States will not address the propriety of the district court's entry of declaratory relief in the circumstances of this case.

[2] The district court found that appellants had failed to grant appellee "an effective opportunity to rebut the claim of conflict [between his two jobs] * * * prior to the termination decision" (J.S. App. 35a).

[3] The district court also initially awarded appellee $5,000 in exemplary damages because of appellants' purported failure to follow departmental disciplinary guidelines in firing him (J.A. App. 51a). On reconsideration, the court vacated this award as "not supported by the evidence" (*id.* at 72a).

adopted Highway Patrol personnel regulation that required a "complete investigation" into charged instances of misconduct prior to the termination of a departmental employee (*id.* at 69a).[4] On the basis of this administrative defect, the court held that appellants "are not entitled to qualified immunity because their belief in the legality of the challenged conduct was unreasonable" (*id.* at 70a). The court explicitly recognized that appellee "is not entitled to recover damages based on the theory" that appellants violated his "clearly established due process" rights, but it concluded that "he may recover compensatory damages for [appellants'] failure to comply with the department's procedures in regard to his dismissal" (*id.* at 71a). The court therefore reaffirmed its $4,200 award of compensatory damages, emphasizing that, if the departmental order violated by appellants "had not been adopted just prior to [appellee's] dismissal, no damages of any kind could be awarded" (*id.* at 70a).

The court of appeals affirmed "on the basis of the Memorandum and Opinion of the district judge" (J.S. App. 83a-84a).[5]

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[4] The regulation provides, in pertinent part (J.S. App. 69a):

> Upon receiving a report of * * * a violation of Department or Division rules and regulations * * *, the Director shall order a complete investigation to determine the true facts concerning the circumstances surrounding the alleged offense. The completed investigation report will also contain a written statement made by the employee against whom the complaint was made. If after a thorough study of all information concerning the violation, the Director decides that a * * * dismissal will be in order, he will present the employee in writing with the reason or reasons for such actions.

[5] Appellants have invoked the Court's appellate jurisdiction under 28 U.S.C. 1254(2), which permits appeal of any decision of a court of appeals holding a state statute unconstitutional, but which restricts review "to the Federal questions presented." Relying upon a narrow interpretation of Section 1254(2), appellee has argued that the immunity question addressed by the United States in this brief is not properly before the Court (Mot. to Dis. or Aff. 26-28). See also 12 *Moore's Federal Practice* ¶ 435.01[2], at 6-55 (2d ed. 1982).

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's decisions regarding the scope of official immunity from damages actions brought under 42 U.S.C. 1983 and *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), reflect "an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, * * * but also 'the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority'" (*Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982), quoting *Butz* v. *Economou*, 438 U.S. 478, 504-505, 506 (1978)). The tension between these "competing values" has been resolved by according most public officers "qualified immunity" from constitutional damages actions arising out

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The United States submits that the Court has the authority to reach and should address the second "federal question" presented by appellants.

Although the Court has noted that "statutes authorizing appeals are to be strictly construed" (*Silkwood* v. *Kerr-McGee Corp.*, No. 81-2159 (Jan. 11, 1984), slip op. 7), the parameters of an appeal under 28 U.S.C. 1254(2) are not as narrow as appellee suggests. See 17 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4037, at 40-41 (1978); Stern & Gressman, *Supreme Court Practice* 68 (5th ed. 1978). In construing the parallel provision authorizing appeals from state courts, 28 U.S.C. 1257, the Court has given its appellate jurisdiction a considerably broader scope. See *Flournoy* v. *Wiener*, 321 U.S. 253, 263 (1944) ("Appellant having assigned as error the decision of the Louisiana Supreme Court holding the federal Act invalid, the case is properly an appeal, and appellant could have included in his assignments of error any other denial of federal right whether or not capable in itself of being brought here by appeal"). And, in *Leroy* v. *Great Western United Corp.*, 443 U.S. 173 (1979), the Court adressed a venue issue raised by the appellants without intimating that such a course of action raised jurisdictional difficulties under 28 U.S.C. 1254(2). Like the venue issue in *Leroy*, the qualified immunity issue presented by appellants is a "federal question" of significant import. It is, therefore, within the appellate jurisdiction of the Court.

of the performance of their official duties.[6] Although the exact parameters of this "qualified immunity" remained unclear for a time (see, *e.g.*, *Scheuer* v. *Rhodes*, 416 U.S. 232, 249 (1974)), it is now settled that public officials are immune from claims for monetary damages unless they violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. at 818. See also *Procunier* v. *Navarette*, 434 U.S. 555, 565 (1978); *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975).

In this case, appellee entered federal court with a claim that appellants had violated his Fourteenth Amendment right to procedural due process by terminating his employment without notice and a hearing. Although the district court ultimately concluded that appellee's constitutional right to such procedures was not clearly established at the time of his dismissal, it nevertheless held that appellants were not entitled to qualified immunity because appellee's termination did not comply with the dictates of an applicable Highway Patrol personnel regulation (J.S. App. 71a). Because, in its view, appellants' failure to follow a state departmental regulation was "unreasonable" (*id.* at 70a), the court awarded appellee damages for the "mental and physical pain and suffering" (*id.* at 81a) caused by appellants' conduct.

The decision of the courts below has some surface appeal. By making a public official's eligibility for qualified immunity depend upon whether his conduct was "reasonable" in all the circumstances, the decision undoubtedly furthers the public interest in compensating aggrieved

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[6] To date, absolute immunity has been accorded only to the President (*Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982)), members of the judiciary (*Stump* v. *Sparkman*, 435 U.S. 349 (1978)), congressmen and their aides performing legislative functions (*Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975); *Gravel* v. *United States*, 408 U.S. 606 (1972)), and prosecutors and administrative officers engaged in adjudicative or prosecutorial functions (*Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Butz* v. *Economou*, 438 U.S. at 508-517).

citizens and deterring official misconduct. The lower courts, however, did not consider whether such an expansion of liability for constitutional torts would " 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials] in the unflinching discharge of their duties.' " *Harlow* v. *Fitzgerald*, 457 U.S. at 814 (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)). The decision below fails to recognize that the "resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative." *Harlow* v. *Fitzgerald*, 457 U.S. at 813-814. By making the availability of qualified immunity turn on compliance with state administrative procedure, rather than on the observance of clearly established constitutional rights, the lower courts have dramatically and erroneously altered the liability/immunity balance so recently struck in *Harlow*.

The approach of the lower courts is misguided for several reasons. First, the prior decisions of this Court hold that under the now-prevailing objective qualified immunity test, an official is entitled to immunity in a constitutional damages action unless he disregards the "clearly established" constitutional rights of the plaintiff; here, appellants did not violate any clearly established due process right of appellee. Second, the lower courts' rationale threatens to undermine the Court's recent reformulation of the qualified immunity standard. In *Harlow*, the Court foreclosed any inquiry into the subjective "good faith" of a public official in order to "permit '[i]nsubstantial lawsuits [to] be quickly terminated' " (457 U.S. at 814 (quoting *Butz* v. *Economou*, 438 U.S. at 507-508)). Under the approach embraced below, and contrary to what *Harlow* sought to accomplish, the immunity of public officials will become less certain and predictable—and more difficult to establish in dispositive pre-trial motions—as courts delve into the nature, extent and possible justifications for statutory or regulatory lapses by defendant officials. Finally, the decision below will unjustifiably deter vigorous

decisionmaking by public officers and discourage legislatures and other regulatory bodies from enacting prophylatic measures to channel official conduct.

ARGUMENT

A PUBLIC OFFICIAL IS ENTITLED TO QUALIFIED IMMUNITY FROM A CONSTITUTIONAL DAMAGES SUIT UNLESS HE HAS VIOLATED A "CLEARLY ESTABLISHED" CONSTITUTIONAL RIGHT

A. The Objective Qualified Immunity Test Formulated By The Court In Constitutional Damages Actions Focuses On The Violation Of Constitutional, Not Statutory Or Regulatory, Rights

This Court's decisions evidence significant evolution in the concept of official qualified immunity. Beginning from generalized notions of good faith (*Pierson* v. *Ray*, 386 U.S. 547, 555-557 (1967)), the doctrine of qualified immunity developed subjective and objective components (*Wood* v. *Strickland*, 420 U.S. at 322), and most recently has been reformulated as an entirely objective test (*Harlow* v. *Fitzgerald*, 457 U.S. at 818). Although a public official's claim to qualified immunity in a constitutional damages action previously encompassed a wide-ranging consideration of the legal and factual circumstances surrounding the alleged official misconduct, invocation of qualified immunity now raises a single, strictly legal issue: whether the plaintiff has alleged the violation of a clearly established constitutional right of which a reasonable public official would have known.

Here, it is undisputed that appellants did not violate any clearly established constitutional norm in dismissing appellee from his job with the Florida Highway Patrol. Indeed, at the time appellants acted, they had no reason to know that their conduct transgressed constitutionally mandated concepts of due process. In these circumstances, the lower courts erred in rejecting appellants' defense of qualified immunity.

1. This Court's modern qualified immunity jurisprudence begins with *Pierson* v. *Ray*, *supra*. There, without

using the term "qualified immunity," the Court held that the traditional "good faith and probable cause" defense available to police officers in arrest cases at common law remained available in constitutional suits under 42 U.S.C. 1983 (386 U.S. at 555-557). The defense would apply where "the officers reasonably believed in good faith that the arrest was constitutional, * * * even though the arrest was in fact unconstitutional" (*id.* at 557). Although the Court suggested that police officers would not be immune from suit if they acted in subjective bad faith (*ibid.*), the Court stressed that this "good faith" immunity had an objective component. Police officers could be held liable only if they violated established constitutional rights: "a police officer is not charged with predicting the future course of constitutional law" (*ibid.*).

In the mid-1970s the Court issued a series of decisions applying the "good faith" defense, now called "qualified immunity," to a variety of constitutional damages claims against state officials under 42 U.S.C. 1983. *Scheuer* v. *Rhodes*, *supra*, was a Section 1983 suit against the Governor of Ohio and others arising out of a much-publicized shooting incident at Kent State University. Although the procedural posture of the case gave the Court "no occasion for a definitive exploration of the scope of [qualified] immunity" (416 U.S. at 249),[7] the Court nevertheless held that *Pierson*'s interlocking requirements of subjective good faith and objective reasonableness provided the appropriate immunity inquiry in constitutional damages cases. 416 U.S. at 244-248.[8]

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[7] The court of appeals had sustained the district court's dismissal of the complaints in *Scheuer* on the ground of "absolute 'executive immunity'" (416 U.S. at 238). After concluding that the respondents were entitled to qualified rather than absolute immunity, the Court declined to determine the precise scope of that reduced immunity from suit (416 U.S. at 249-250).

[8] The Court explained in *Scheuer* that "[i]t is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct" (416 U.S. at 247-248).

A year later, *Wood* v. *Strickland*, *supra*, squarely applied the *Pierson* test to a Section 1983 action based on an alleged denial of procedural due process. In *Wood* the Court expressly established a two-part qualified immunity test that turned upon subjective intent as well as the objective reasonableness of the public official's conduct. According to *Wood*, a school board member would be immune from students' constitutional suits unless he acted with "an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith" (420 U.S. at 322). *Procunier* v. *Navarette*, 434 U.S. at 561-562, applied the same test to a damages suit based on a constitutional controversy over state prisoners' mailing privileges. Both *Wood* and *Navarette*, however, emphasized the objective prong of this two-part test; the Court reiterated in each case that an official cannot be expected to predict "the future course of constitutional law." 420 U.S. at 322; 434 U.S. at 562.

In 1978, this Court held that, in general, federal officials sued directly under the Constitution would receive the same immunity as state officials sued under Section 1983. *Butz* v. *Economou*, *supra*. The Court kept the subjective and objective components of the qualified immunity doctrine intact (438 U.S. at 507), but expressed its expectation that qualified immunity, coupled with the "firm application of the Federal Rules of Civil Procedure," would permit the speedy resolution of "insubstantial lawsuits" (438 U.S. at 507-508). See also *Hanrahan* v. *Hampton*, 446 U.S. 754, 764-765 (1980) (Powell, J., concurring in part and dissenting in part).

The history leads to *Harlow* v. *Fitzgerald*. Despite the Court's expressed desire in *Butz* that governmental officials not be "harassed by frivolous lawsuits" (438 U.S. at 508), it had become apparent that the "impermissible motivation" or "bad faith" component of the qualified immunity test prevented summary disposition of many, if not most, meritless constitutional damages claims (*Har-*

low, 457 U.S. at 815-816). Because an "official's subjective good faith has been considered to be a question of fact" (457 U.S. at 816), and Fed. R. Civ. P. 56 does not permit summary disposition of disputed questions of fact, the invocation of official qualified immunity rarely prevented a trial; plaintiffs could almost always raise a factual issue regarding the defendant's "good faith." The Court noted in addition that "substantial costs attend the litigation of the subjective good faith of government officials" (457 U.S. at 816). These costs include "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service" (*ibid.*).

The Court, therefore, reassessed the "balanc[e] of competing values" that undergirded its prior qualified immunity cases and reformulated the concept of official qualified immunity (457 U.S. at 816). As a result, the subjective "good faith" component of qualified immunity was abandoned in favor of a purely objective test: officials performing discretionary functions would henceforth be shielded from liability in constitutional damages actions unless their conduct violated "clearly established" constitutional rights (457 U.S. at 818).

The Court's reformulation of the controlling legal test significantly increased the effectiveness of the protections afforded by official qualified immunity. This fact is evidenced by comparing that immunity after *Harlow* with this Court's description of qualified immunity in *Imbler* v. *Pachtman*, *supra*. There, the Court noted "important" procedural differences between qualified and absolute immunity: while "absolute immunity defeats a suit at the outset, * * * [t]he fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial" (424 U.S. at 419 n.13 (*citing Scheuer* v. *Rhodes*, 416 U.S. at 238-239; *Wood* v. *Strickland*, 420 U.S. at 320-322)). This comparison of absolute and qualified immunity, undoubtedly correct when rendered, is no longer apt—*Harlow* explicitly restructured the qualified im-

munity test to permit the defeat of a suit without the necessity of presenting evidence at trial.[9] The Court achieved this result, moreover, without departing from the historical roots of qualified immunity doctrine. The objective test demands respect for "basic, unquestioned constitutional rights" (*Wood* v. *Strickland*, 420 U.S. at 322) while ensuring that public officials will not be "charged with predicting the future course of constitutional law" (*Pierson* v. *Ray*, 386 U.S. at 557).

2. Application of the above principles to the facts of this case would seem to require reversal of the lower courts without further discussion. It is undisputed that appellants did not violate any clearly established due process right of appellee (see J.S. App. 66a-67a). Hence, appellants are immune from a suit resting on due process grounds.

In an effort to avoid this result, however, appellee has seized upon the statement in *Harlow* that a government official will lose his qualified immunity if he violates a "clearly established *statutory* or constitutional right[]"

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[9] See *Czurlanis* v. *Albanese*, 721 F.2d 98, 108 (3d Cir. 1983) ("We interpret [*Harlow*] as instructing the lower federal courts that the issue of qualified immunity would ordinarily be one of law for determination by the courts"); *Zweibon* v. *Mitchell*, 720 F.2d 162, 168 (D.C. Cir. 1983) (following *Harlow* the invocation of qualified immunity raises a "purely legal threshold question" because "once the trial judge determines that the law was not clearly established at the time the contested conduct occurred, the inquiry ceases"); *Windsor* v. *The Tennessean*, 719 F.2d 155, 165 (6th Cir. 1983), petition for cert. pending, No. 83-5611 ("The barriers to summary judgment presented by the discarded mixed objective-subjective test * * * no longer exist;" *Harlow's* "purely objective test" is to be applied "as a matter of law before discovery occurs") (citation omitted); *Stokes* v. *Delcambre*, 710 F.2d 1120, 1125 (5th Cir. 1983) (quoting *Trejo* v. *Perez*, 693 F.2d 482, 485 (5th Cir. 1982)) (*Harlow* establishes a two-level "progressive" inquiry: "'(1) Was the law clearly established at the time? If the answer to this threshold question is no, the official is immune. (2) If the answer is yes, the immunity defense ordinarily should fail unless the official claims extraordinary circumstances and can prove that he neither knew nor should have known that his acts invaded settled legal rights'").

(457 U.S. at 818) (emphasis added). Appellee contends (Mot. to Dis. or Aff. 21-26) that this statement supports the district court's conclusion that the violation of a statutory or regulatory provision precludes a public official from claiming qualified immunity from constitutional damages, even where the constitutional right violated by the official was not "clearly established" at the time he acted.[10] But, aside from its unexplained use of the term "statutory * * * rights" (457 U.S. at 818), *Harlow* contains no support for the decision below. On the contrary, a careful reading of *Harlow* indicates that the Court intended no change in the objective component of the qualified immunity test, which since the time of *Pierson* v. *Ray* has focused exclusively on whether an official had reason to believe that his conduct was unconstitutional.[11] Several factors dictate this conclusion.

First, the reference in *Harlow* to "clearly established statutory * * * rights" (457 U.S. at 818) seems no more than an acknowledgment that the plaintiff in *Harlow* was seeking damages on statutory as well as constitutional theories (457 U.S. at 820 n.36).[12] Given the statutory allegations in *Harlow*, and in the absence of any explanation from this Court, it is fair to conclude that

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[10] This case, of course, does not even involve a "statutory" right; appellants have been mulcted in damages for violating a Highway Patrol personnel regulation.

[11] See *Zweibon* v. *Mitchell*, 720 F.2d at 172 ("*content* of the [*Harlow*] standard is identical to that for establishing the 'objective' element of the old two-pronged test for qualified immunity") (emphasis in original).

[12] The respondent in *Harlow* sought damages for the violation of 5 U.S.C. 7211 and 18 U.S.C. 1505. Although the petitioners urged the Court "to rule on the legal sufficiency of respondent's 'implied' causes of action" under those statutes, the Court declined to address that question, noting that it had taken "jurisdiction of the case only to resolve the immunity question" (457 U.S. at 820 n.36). See also *Nixon* v. *Fitzgerald*, 457 U.S. at 748 n.27 (Court assumes, arguendo, in a companion case to *Harlow* "that private causes of action may be inferred * * * under * * * the two statutes on which respondent relies").

the "statutory" component of the *Harlow* test comes into play only where, as in *Harlow* itself and as may occur with some frequency in suits against state officials under 42 U.S.C. 1983 (see *Maine* v. *Thiboutot*, 448 U.S. 1 (1980)), plaintiffs seek damages from public officials for violation of statutory rights.[13] However, where a plaintiff seeks damages for violation of his *constitutional* rights, the immunity inquiry should focus on whether *those* rights were clearly established.[14]

Second, the Court in *Harlow* cited two cases in support of its reformulation of the qualified immunity test (457 U.S. at 818): *Procunier* v. *Navarette*, *supra*, and *Wood* v. *Strickland*, *supra*. Those cases, however, considered only whether officials had violated "clearly established constitutional rights," and did not suggest a further, statutory inquiry. Indeed, in *Navarette*, the prisoner plaintiffs claimed that the prison authorities had suppressed mail in "knowing disregard" of "applicable statewide prisoner mail regulations." 434 U.S. at 557. The Court, despite some expressed concern regarding this allegation (434 U.S. at 570-571) (Stevens, J., dissenting), granted the defendants qualified immunity as a matter of law, finding that "there was no established First Amendment right protecting the mailing privileges of state prisoners and that hence there was no such federal

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[13] Where a plaintiff seeks recovery for violation of a statutory right, whether or not the statutory right was "clearly established" at the time of the alleged violation would, of course, be central to the defendant official's claim of qualified immunity.

[14] See, *e.g.*, *Windsor* v. *The Tennessean*, 719 F.2d at 165 ("*If the law which the defendant is alleged to have violated* is clearly established, then the qualified immunity defense should fail") (emphasis added); *Harris* v. *Young*, 718 F.2d 620, 623 (4th Cir. 1983) (focus of *Harlow* is on "'clearly established constitutional rights"); *Barnett* v. *Housing Authority*, 707 F.2d 1571, 1582 (11th Cir. 1983) ("*Harlow* directs our attention to the *constitutional violation at issue*") (emphasis added); *Johnson ex rel. Johnson* v. *Brelje*, 701 F.2d 1201, 1210 (7th Cir. 1983) (when defendants have not violated clearly established constitutional right, violation of state law does not abrogate qualified immunity).

right about which [defendants] should have known." 434 U.S. at 562-563. The current case is no different from *Navarette*. It is difficult to understand why the present appellants' alleged violation of state regulations should divest them of qualified immunity in a constitutional suit, while the claimed regulatory violations in *Navarette* were of no consequence.

Finally, *Harlow*—like all the other qualified immunity cases decided by this Court—reiterated that a prime purpose of the objective test is to ensure that public officials not be required to anticipate as yet undeclared constitutional rights. 457 U.S. at 819 n.33. Yet that is precisely what would occur if, as held by the courts below, an official's compliance with relevant statutes and regulations became the inquiry in constitutional damages suits. Under that view of qualified immunity, an official could be held personally liable in damages even where the constitutional right he violated was not "clearly established" when he acted. It seems unlikely that *Harlow* silently created such an anomaly.[15]

B. Abrogation Of Qualified Immunity In Constitutional Damages Actions On The Basis Of A Statutory Or Regulatory Violation Is Inconsistent With The Rationale Of *Harlow* v. *Fitzgerald*

In *Harlow*, the Court steered a careful path between the competing interests at stake whenever a claim of official immunity is raised. The Court sought to provide a "realistic avenue for vindication of constitutional guarantees," without unduly diverting "official energy from

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[15] Indeed, Justice Brennan's concurring opinion in *Harlow* summarized the decision as "imposing liability when a public-official defendant 'knew or should have known' of the *constitutionally violative effect* of his actions" (457 U.S. at 820-821) (emphasis added). Justice Brennan presumably was discussing the commonplace constitutional damages suit, such as the present case, rather than the unusual statutory claims in *Harlow* that necessitated the "statutory" corollary to the qualified immunity standard. See also *id.* at 821 ("the clever and unusually well-informed violator of *constitutional rights* will not evade punishment") (emphasis added).

pressing public issues" (457 U.S. at 814). The objective qualified immunity test forged by the Court achieves these goals: it imposes liability where the alleged constitutional wrong is "clearly established" (457 U.S. at 818), while at the same time permitting "'[i]nsubstantial lawsuits [to] be quickly terminated'" on the basis of legal motions without the necessity of trial (457 U.S. at 814, quoting *Butz*, 438 U.S. at 507-508). The approach taken by the courts below, however, seriously disrupts this careful balance.

The district court's reasoning in denying appellants' qualified immunity claim is somewhat opaque.[16] The district court apparently assumed that defendants in constitutional damages actions are not entitled to official immunity if their conduct was in any way "unreasonable," and that a court should consider the "totality of the circumstances" in making that determination (J.S. App. 68a). Applying that analysis to this case, the court concluded that appellants were not entitled to immunity because, in light of the Highway Patrol regulation, "their belief in the legality of the challenged conduct was unreasonable" (*id.* at 70a). Thus, even though appellants were not aware that their dismissal of appellee violated constitutional standards, and even though the district court twice found that appellants had not acted maliciously or in bad faith (*id.* at 46a, 70a), the court stripped them of qualified immunity because of its determination that "unreasonable" officials should not be able to take advantage of what traditionally has been considered a "good faith" defense.

The district court's reasoning may have made some sense before this Court's decision in *Harlow*, but it obviously is no longer good law.[17] Prior to *Harlow*, a public official's compliance with applicable statutory or regulatory proscriptions was perhaps relevant to the question

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[16] The rationale for rejecting appellants' immunity defense is further clouded by the court of appeals' failure to write an opinion (J.S. App. 83a-84a).

[17] We note that the district court issued its decision on reconsideration approximately two weeks prior to the decision in *Harlow*.

of the official's subjective good faith. The violation of a statute or regulation may have provided some evidence that the official had "acted with such an impermissible motivation * * * that his action cannot reasonably be characterized as being in good faith" (*Wood* v. *Strickland*, 420 U.S. at 322).[18] *Harlow*, however, explicitly foreclosed any inquiry into the subjective motivation behind alleged official misconduct, so that "bare allegations of malice [would] not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery" (457 U.S. at 817-818).

It could be argued, of course, that a limited reintroduction of the subjective element of the qualified immunity defense, to the extent of inquiring into whether the defendant has acted in "bad faith" by violating a statutory or regulatory provision, would raise none of the concerns about protracted evidentiary proceedings that prompted the Court's decision in *Harlow*. But, despite its surface appeal, that argument is incorrect. Although it may appear otherwise at first blush, the mere violation of a statute or regulation provides little objective indication that a public official has acted with an "impermissible motivation" toward a particular plain-

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[18] Indeed, at least one court suggested, in a case decided shortly before *Harlow*, that statutory or regulatory violations were *dispositive* of the subjective good faith issue. See, *e.g.*, *Williams* v. *Treen*, 671 F.2d 892, 899 (5th Cir. 1982), cert. denied, No. 82-281 (Jan. 10, 1983) (violation of state law abrogates qualified immunity because "[i]f an official's conduct contravenes his own state's explicitly and clearly established regulations, a subjective belief in the lawfulness of his action is *per se* unreasonable"). The First Circuit, in a case decided after but without citation to or discussion of *Harlow*, similarly concluded that the violation of a state regulation is sufficient to rebut a "defendant's 'good faith' defense." *King* v. *Higgins*, 702 F.2d 18, 21 (1983). This Court's rejection of the subjective good faith prong of the qualified immunity test undercuts the rationale of both *Williams* and *King*. See *Saldana* v. *Garza*, 684 F.2d 1159, 1163 n.15 (5th Cir. 1982) (*Harlow* "dispensed with the 'subjective' test of official good faith" upon which *Williams* was decided). See also *Johnson ex rel. Johnson* v. *Brelje*, 701 F.2d at 1210 (violation of state law does not abrogate qualified immunity in constitutional damages action).

tiff. Rather, consideration of statutory or regulatory violations in the immunity context would necessarily require extensive analysis of the state of mind of the offending public official, the nature of the legal proscription transgressed, the blame to be attached to such a shortcoming, and all possible justifications for the official action. In short, the approach of the district court would rapidly recreate the difficulties that the Court's reformulation of qualified immunity in *Harlow* was designed to avoid.

1. As a matter of logic, the failure to abide by a statute or regulation cannot demonstrate an "impermissible motivation" unless the offending public official *knows* he is acting in violation of a particular legal proscription. If a state social service worker were to deny a plaintiff welfare benefits in intentional disregard of well-established state procedural regulations, a court might understandably question the good faith of the defendant in a constitutional damages action brought under 42 U.S.C. 1983 and the Fourteenth Amendment's Due Process Clause. However, where the procedural lapse is unknowing or inadvertent, the moral culpability of the public official is considerably less. Actions taken in ignorance of statutory or regulatory provisions, while possibly negligent, can hardly be ascribed to a malicious intent to harm a particular person or be considered the equivalent of the "impermissible motivation" held in *Wood* v. *Strickland*, *supra*, to abrogate the pre-*Harlow* qualified immunity defense. Thus, actions taken without actual knowledge of a legal proscription do not provide substantial objective evidence of bad faith. It would not be appropriate, in such circumstances, to strip a public official of qualified immunity from a constitutional damages claim. Courts, therefore, would necessarily have to determine the state of mind of the defendant official before dissolving his official immunity on the ground of a statutory or regulatory lapse, and the violation itself would not be dispositive on that issue.[19]

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[19] It is not clear, in this case, whether appellants acted in violation of a known, well-established procedural regulation. The district

Not only does a statutory or regulatory violation lack, by itself, any necessary indication of the bad faith of the defendant public official, such a violation may also be irrelevant to the wrong for which the plaintiff seeks redress. It would make little sense to conclude that the violation of *any* statute or regulation demonstrates that the erring public official acted with an "impermissible motivation" toward the plaintiff, regardless of the nature of the provision involved. If a particular statute or regulation is not "intended primarily to confer important procedural [or substantive] benefits" upon the plaintiff (*American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 538 (1970)), its violation should have no impact on the defendant's claim of immunity. A policeman who does not comply with a departmental regulation regarding the use of sirens in residential areas while rushing to a robbery should not be deprived of official immunity in a constitutional damages action arising from his arrest of the robber. Nor should an Internal Revenue Service employee have to fear that the failure to prepare an audit "classification checksheet," as required by office procedures, will subject him to personal liability should a court conclude that the audit itself transgressed some newly declared principle of constitutional law. See II Audit, (CCH) Internal Revenue Manual § 4138.6 (1983).

Furthermore, not every statute or regulation is of equal dignity, and not every statutory or regulatory violation is subject to equal opprobrium. The violation of a personnel regulation designed to provide an employee with seven days' notice prior to a termination hearing clearly has

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court noted that the personnel regulation purportedly transgressed by appellants was adopted "just prior to [appellee's] dismissal" (J.S. App. 70a). Moreover, the district court did not make any finding that appellants were aware of this regulation; the court simply asserted that appellants "should be bound by their Department's own orders" (*id.* at 70a-71a). In fact, as noted above, the court stated on two occasions that it found "no evidence of malicious intention on the part of" appellants (*id.* at 46a; see also *id.* at 70a). Any violation of state regulations in this case, therefore, could well have been unintentional.

more relevance to a constitutional damages action seeking reparation for a due process violation than does the failure to prepare the notice itself in triplicate, as may be required by another administrative provision. By the same token, failure to meet the seven-day notification deadline by 24 hours is surely less probative of "impermissible motivation" than is failure to comply with the notification procedures at all. And even a complete failure to follow the notification procedures might be excusable because of, inter alia, erroneous reliance on an exception to the procedures for "good cause," or the advice of departmental counsel that the procedures are inapplicable, or the direction of a superior officer that the procedures should be disregarded, or an honest, albeit mistaken, belief that strict adherence to the procedures would be inappropriate in a given situation.[20]

Thus, the mere fact that a public official has violated a legally imposed duty is insufficient "objective" evidence, standing alone, to justify the imposition of damages liability; a court faced with such a violation would necessarily have to consider—and likely hear evidence on—whether a particular regulation or statute is "important," or whether a particular violation is insubstantial or otherwise justifiable. Violation of a statute or regulation, in short, is not an infallible "litmus test" for bad faith or unreasonable conduct.[21]

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[20] The evidence in this case showed that appellants "consulted both the [Highway Patrol's] personnel director and the [Patrol's] legal counsel before making the final dismissal decision" (J.S. App. 55a).

[21] Indeed, in this very case the district court found that, despite the regulatory violation, appellants "acted with no malicious intent in their dealings with [appellee]" (J.S. App. 70a). Appellee suggests however, that even though the regulatory violation does not indicate any malicious intent on the part of appellants to harm him, it nevertheless abrogates appellants' official immunity because it demonstrates that they "have exceeded their sphere of discretion" (Mot. to Diss. or Aff. 24). But this Court has never accepted the contention that official immunity disappears any time a plaintiff

2. The above considerations demonstrate that, far from providing "objective" evidence of "impermissible motivation," injection of statutory or regulatory violations into constitutional damages actions would merely open the door to a host of fact-bound disputes, thereby frustrating *Harlow*'s intent to facilitate dispositive pretrial qualified immunity motions (457 U.S. at 815-818). If this Court were to conclude that a statutory or regulatory violation is relevant to a public official's qualified immunity, trial courts would be forced to inquire whether the violation was knowing, whether the transgressed provision confers any rights on the plaintiff, and whether the alleged error was—on the particular facts of the case—insubstantial or otherwise justifiable.[22] There would be "no clear end to the relevant evidence" (*id.* at 817). And if the *Harlow* "objective" test for qualified immunity in constitutional cases routinely were to

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claims that the defendant has exceeded his authority. Rather, the Court has concluded that an official is entitled to raise an immunity claim so long as the "alleged wrongful acts lay * * * within the outer perimeter of his authority" (*Nixon* v. *Fitzgerald*, 457 U.S. at 757). See also *Barr* v. *Matteo*, 360 U.S. 564, 575 (1959) (fact "that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable").

It is undisputed that appellants acted well within their respective spheres of authority in dismissing appellee; accordingly, the mere fact that appellee questions appellants' compliance with a personnel regulation does not, by itself, destroy their entitlement to qualified immunity. Any other rule would subject public officials "to trial on virtually every allegation that an action was unlawful, or was taken for a forbidden purpose" (*Nixon* v. *Fitzgerald*, 457 U.S. at 756).

[22] The district court did not pause to consider these factors. Although appellants arguably did not comply formally with the provisions of the personnel regulation cited by the court, the district court's own opinion shows that appellants conducted a thorough investigation into the circumstances surrounding appellee's dismissal, gave appellee numerous warnings as well as the opportunity to respond to those warnings in writing, and provided him with written reasons for his termination (see J.S. App. 6a-9a). The allegedly transgressed personnel regulation required little, if any, more (see *id.* at 69a). See also notes 19 & 20, *supra*.

require an inquiry into statutory and regulatory violations, there would appear to be no reason not to consider violations of other legal or ethical obligations as well, such as common law or contract obligations, or the various professional codes that govern the conduct of certain public officials. See, *e.g.*, Model Rules of Professional Conduct (1983); 1 *Criminal Justice Standards* chs. 3 & 4 (1980) (Standards Relating to the Prosecution Function and the Defense Function). Indeed, if the idea is to match perfectly the qualified immunity defense with public officials whose actions are "legal" or "reasonable" in every respect, the Court might as well resurrect the subjective "good faith" standard it discarded in *Harlow*.

In *Harlow*, however, this Court determined that, except perhaps where there is a right to statutory damages, only egregious constitutional violations preclude a public official from claiming qualified immunity. That standard on rare occasion may exculpate public officials who act maliciously, but it is necessary to prevent harassment of officials by insubstantial damages claims. As Judge Learned Hand suggested many years ago, official immunity is a price society willingly pays to avoid including diligent public servants among those exposed to trial and liability. *Gregoire* v. *Biddle*, 177 F.2d at 581.

In sum, the consequences of narrowing qualified immunity to those who can satisfy a judge or jury that their conduct was legally valid in every particular would be severe. Public officials would no longer enjoy a predictable or certain immunity standard, and *Harlow*'s expectation of expeditious handling of constitutional tort claims would be defeated in many situations.[23] This Court

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[23] The Court abandoned the "good faith" element of the qualified immunity defense in *Harlow* in part because "[i]t is not difficult for ingenious plaintiff's counsel to create a material issue of fact * * * where subtle questions of * * * a decisionmaker's mental processes are involved." 457 U.S. at 817 n.29 (quoting from *Halperin* v. *Kissinger*, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring), aff'd by an equally divided Court, 452 U.S. 713 (1981)). The reformulation of the immunity defense adopted by the courts

should adhere to its established standard that, in constitutional suits, public officials are immune unless they violate "clearly established constitutional rights." That standard both serves the needs of effective government and ensures compensation to victims of blatantly unconstitutional conduct.

C. Abrogation Of Qualified Immunity In Constitutional Damages Actions Because Of A Regulatory Or Statutory Violation Would Unjustifiably Deter the Vigorous Performance Of Important Governmental Functions

As the courts and commentators have recognized, any immunity for public officials that is less than absolute is likely to have a serious, negative impact on decisionmaking. See *Nixon* v. *Fitzgerald*, 457 U.S. 731, 753 (1982); *Stump* v. *Sparkman*, 435 U.S. 349, 355-356 (1978); P. Schuck, *Suing Government* 59-81 (1983); Cass, *Damage Suits Against Public Officers*, 129 U. Pa. L. Rev. 1110 (1981).[24] The Court has nevertheless concluded that victims of deliberate constitutional misconduct should receive compensation, both out of fairness to the victims and out of a desire to deter egregious misuse of governmental power. See *Butz* v. *Economou*, 438 U.S. 504-508. The device of qualified immunity, in this Court's judgment, tolerably balances the needs of effective government and compensation of the victims of official wrong-

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below similarly would create an incentive for ingenious plaintiff's counsel to scour the statute books, regulations, and internal guidelines for the purpose of alleging that the defendant official's actions were unreasonable.

[24] An official inevitably finds "it difficult honestly and independently" to do his work if he knows "that unfavorable [action], coupled with an allegation of * * * malice, could subject him to * * * possible personal liability, as a result of which he might lose his home, his automobile, his savings and whatever other property, real or personal, he might possess." *Ove Gustavsson Contracting Co.* v. *Floete*, 299 F.2d 655, 658 (2d Cir. 1962), cert. denied, 374 U.S. 827 (1963). See also *Butz* v. *Economou*, 438 U.S. at 526-527 (Rehnquist, J., dissenting).

doing. That balance would tilt sharply against effective government, however, if public officials were held accountable in constitutional damages actions not only for indifference to "clearly established constitutional rights," but also for statutory and regulatory violations that are later determined to amount to a constitutional wrong. Such a rule would unduly chill competent and capable decisionmaking and would create a strong incentive for legislative and regulatory bodies not to enact prophylactic measures that go beyond current constitutional boundaries.

1. It is a fairly easy matter, as this Court well knows, to allege violations of open-ended constitutional provisions like the Due Process and Equal Protection Clauses. In recent times, for example, this Court has addressed whether matters as mundane as the negligent loss of prisoners' personal property (*Parratt* v. *Taylor*, 451 U.S. 527 (1981)), public employees' hair length (*Kelley* v. *Johnson*, 425 U.S. 238 (1976)), access by minors to coin-operated amusement devices (*City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283 (1982)), and local rock music concerts (*City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981)) implicate constitutional concerns. As the Court has remarked, a public official's risk of tort liability under Section 1983 "cover[s] a large range of activity in everyday life." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. at 270.

Virtually any action taken by a public official, therefore, can result in a constitutional damages suit. A public official may overcome his apprehension of constitutional suits, however, and continue to serve the public in a vigorous and unintimidated manner, if he knows that he is at financial risk only if he defies a clearly established constitutional standard—a "basic, unquestioned constitutional right[]" (*Wood* v. *Strickland*, 420 U.S. at 322). But if the official's personal liability extends to all instances where a court, sifting through the myriad statutes or regulations that may apply to his conduct, declares

after the fact that a particular action transgressed not only a statute or regulation but also a newly declared constitutional right, the threat to effective government will increase markedly.

The approach taken by the district court is unduly disruptive of vigorous official decisionmaking because of the stiff penalty it exacts for a statutory or regulatory violation that, by itself, may not encompass a damages remedy. Regulatory bodies routinely impress a range of substantive and procedural proscriptions on government functionaries, thereby determining both the scope of discretion available to public officials and the consequences attending official misconduct. However, in imposing constitutional damages liability on appellants because of their purported regulatory lapse,[25] the district court did not consider whether, in promulgating its personnel regulation, the Florida Highway Patrol intended either to require that the mandated procedures occur in some formal sequence[26] or to impose stiff monetary fines upon erring officials. The Highway Patrol may well have intended that any transgression of the regulation be remedied through the state civil service appeals system and be deterred or punished by internal sanctions. But henceforth, the regulation involved in this case—as well as other, certainly more innocuous Highway Patrol regulations—will attain a sanctity clearly not foreseen by those who promulgated it. Appellants and other officers, with one eye on their pocketbooks and the other eye on

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[25] There is no question here that, absent appellants' alleged violation of the state Highway Patrol regulation, they would be immune from suit; the district court expressly stated that, without the state regulation, "no damages of any kind could be awarded" (J.S. App. 70a).

[26] The regulation clearly requires an investigation into allegations of employee misconduct, an opportunity for the investigated employee to respond in writing, and written reasons for any termination decision (J.S. App. 69a). As noted earlier (note 22, *supra*), the district court's opinion shows that appellants complied—at least informally—with these requirements (J.S. App. 6a-9a).

administrative guidelines, will walk wide of the mark set in any departmental regulation, whether or not the State of Florida or the Highway Patrol sought to enforce such exacting conduct.

The abrogation of qualified immunity in a constitutional damages action on the basis of statutory or regulatory violations thus would compel government decisionmakers to hew much closer to the "regulatory or statutory line"—and accordingly *would* deter much more conduct, including perfectly lawful conduct—than the enacting lawmakers may ever have intended. Such a result rests on less than firm legal ground,[27] and is certainly unwise as a matter of sound governmental policy.

Of course, even under appellee's reading of *Harlow*, post facto constitutional liability presumably would result only where a public official has violated a "clear" statute or regulation. But that condition offers little comfort, for public employees operate under a plethora of statutes,

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[27] The district court's approach, in effect if not in form, provides an "implied" damages remedy for the regulatory or statutory provisions involved in a constitutional damages suit. See J.S. App. 71a (even though appellee "is not entitled to recover damages based on the theory that [the due process violation was clearly established], he may recover compensatory damages for [appellants'] failure to comply with the [Highway Patrol's] procedures in regard to his dismissal"). If the decision below is affirmed, in every case where statutory or regulatory violations are pertinent to the qualified immunity issue (*i.e.*, those cases where there was no violation of a "clearly established constitutional right"), the sine qua non of a damages recovery will be a showing of a statutory or regulatory violation. And, although damages formally will be awarded for the "constitutional" injury, the mechanism in many instances will provide a ready "end run" around the Court's precedents controlling the creation of implied statutory damages actions. See, *e.g.*, *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 13-15, 19-21 (1981). *Cf. Davis* v. *Passman*, 442 U.S. 228, 241 (1979) (judiciary is "primary means" through which constitutional rights are enforced, but "[s]tatutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner").

rules, and regulations that later may seem "clear" to judges or juries, but rarely are so clear in the heat of an emergency or as applied to unanticipated facts. Furthermore, although each employee ideally should know and understand the statutes and regulations bearing upon his performance, attaining such knowledge can be a formidable task. See generally any title of the Code of Federal Regulations; any issue of the Federal Register. At bottom, regardless of an employee's good faith efforts to comply with all pertinent job standards, what is required for fearless decisionmaking is confidence that unexpected liability will not occur. That confidence cannot be built in the face of the possibility that an unpredictable confluence of open-ended constitutional provisions and vague statutory or regulatory requirements will result in ruinous personal damages.[28]

2. The result below not only will interfere with effective official action by chilling government decisionmakers, it will also deter regulatory bodies who oversee official conduct from taking steps to proscribe and channel potential future misconduct. If the courts below are correct that statutory or regulatory requirements that anticipate later developments in constitutional law give rise to damages liability when violated, regardless of the intent of

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[28] A number of complex statutory and regulatory provisions, many of which demand the exercise of discretion in interpretation and enforcement, apply to the actions of public officials. If the decision below is not reversed, these provisions will become mine fields in which such officials will operate at their own risk. The Internal Revenue Code, and its implementing regulations, are but one example of a complex regulatory scheme where an inadvertent misstep by a government official could result in significant "constitutional" liability. See *Bothke* v. *Fluor Engineers & Constructors, Inc.*, 713 F.2d 1405 (9th Cir. 1983) (court of appeals expresses it view that a low-level IRS employee is not entitled to qualified immunity from a constitutional damages suit because she failed to construe a rambling protest letter, mailed by the plaintiff taxpayer long before the defendant IRS employee was assigned to collect the plaintiff's delinquent taxes, as a request for an "abatement" of assessed taxes).

the enacting body, legislatures and government agencies will have a powerful incentive not to enact protective provisions that go beyond the current minimum requirements of the Constitution. Rather than subject government officials to onerous personal liability for the violation of provisions foreshadowing constitutional developments, regulatory bodies may well opt to "have no rules except those mandated by [the Constitution], or to have them framed in a mere precatory form." *United States* v. *Caceres*, 440 U.S. 741, 756 (1979).

Such an incentive structure should be avoided. Statutes and regulations often provide greater rights than are secured by the Constitution. In this case, for example, the Highway Patrol regulation relied upon by the district court requires a "complete investigation" into allegations of employee misconduct (J.S. App. 69a). While such an investigation prior to the termination of an employee is undoubtedly consonant with sound notions of fair play, we are unaware of any decision declaring that such a procedure is required by the Fourteenth Amendment's Due Process Clause. As a result of the lower court's decision, however, Florida officials may delete any "complete investigation" requirement from their personnel regulations because the protection the provision affords government employees is simply outweighed by the potential personal liability the requirement creates for executive officials should a court conclude, sometime in the future, that a "complete investigation" is in fact required by the Due Process Clause. Indeed, the decision below has the perverse result of punishing appellants because they were unlucky enough to work for a concerned, attentive governmental body; appellants would be much better off if the Highway Patrol had entirely disregarded appellee's interests by not mandating any particular termination procedures.

This Court, therefore, should reject appellee's reformulation of the qualified immunity defense because of the inhibiting effect it would have on the development of regu-

lations and statutes governing the conduct of public officials. To paraphrase the Court's reasoning in *United States* v. *Caceres*, 440 U.S. at 755, "[r]egulations governing the conduct of [public officials] are generally considered desirable, and may well provide more valuable protection to the public at large than the deterrence [of official misconduct] flowing from the occasional [award of damages in a constitutional tort action]."

CONCLUSION

The judgment of the court of appeals on qualified immunity should be reversed.

Respectfully submitted.

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v.
Gregory Scott Scherer

Docketed:
September 21, 1983

Court: United States Court of Appeals
for the Eleventh Circuit

Counsel for appellant: Franks, Mitchell D.

Counsel for appellee: Patterson III, Benjamin R.

Entry	Date	Note	Proceedings and Orders
1	Sep 21 1983	G	Statement as to jurisdiction filed.
2	Oct 21 1983		Motion of appellee Gregory S. Scherer to dismiss or affirm filed.
3	Oct 26 1983		DISTRIBUTED. November 11, 1983
4	Nov 2 1983	X	Reply brief of appellants Ralph Davis, et al. filed.
5	Nov 9 1983		Record requested.
6	Nov 14 1983		Record filed.
7	Nov 14 1983		Certified original record on appeal & C.A. proceedings, 7 volumes received. (Box).
8	Nov 16 1983		REDISTRIBUTED. December 2, 1983
10	Dec 5 1983		REDISTRIBUTED. December 9, 1983
11	Dec 12 1983		PROBABLE JURISDICTION NOTED.
			**********
13	Jan 18 1984		Order extending time to file brief of appellant on the merits until February 9, 1984.
14	Feb 9 1984		Brief amicus curiae of United States filed.
15	Feb 9 1984		Brief of appellants Ralph Davis, et al. filed.
16	Feb 9 1984		Joint appendix filed.
17	Feb 21 1984	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
19	Mar 1 1984		Order extending time to file brief of appellee on the merits until March 19, 1984.
20	Mar 5 1984		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Marshall OUT.
21	Mar 19 1984		Brief amicus curiae of ACLU filed.
22	Mar 20 1984		SET FOR ARGUMENT. Monday, April 16, 1984. (4th case)
23	Mar 21 1984		Brief of appellee Gregory S. Scherer filed.
24	Mar 26 1984		CIRCULATED.
25	Apr 5 1984	X	Reply brief of appellants Ralph Davis, et al. filed.
26	Apr 16 1984		ARGUED.